PP

v.

DATO' BALWANT SINGH (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
AUGUSTINE PAUL J
[CRIMINAL TRIAL NO: 45-33-2002]
23 JULY 2003

CRIMINAL LAW: *Penal Code - Section 302 - Murder - Defences - Private defence - Whether accused had reasonable apprehension of danger to his body or life - Whether accused entitled to exercise right of private defence - Penal Code, ss. 96, 97, 99, 100, 102*

EVIDENCE: *Statement - Accused's statement to police - Whether statement properly tendered before court - Whether parts of statement contradicted evidence of accused - Whether specific contradictory parts brought to accused's attention - Whether credibility of accused affected - Whether statement admissible - Evidence Act 1950, ss. 145(1), 157*

EVIDENCE: *Corroboration - Prior statement of witness - Whether statement properly tendered before court - Whether parts of statement contradicted evidence of accused - Whether specific contradictory parts brought to accused's attention - Whether credibility of accused affected - Whether statement admissible - Evidence Act 1950, ss. 145(1), 157*

The accused was charged with the offence of murder *ie*, causing the death of the deceased under s. 302 of the Penal Code. The accused and the deceased had been involved in an argument that culminated in the accused, in possession of a gun at that material time, firing two shots, the second of which killed the deceased. The judge was satisfied that the prosecution had made out a *prima facie* case and called for the defence; the accused entered a defence of private defence. A preliminary issue requiring consideration was whether a statement from the accused under s. 112 of the Criminal Procedure Code ('exh. D43') to one of the police personnel involved in the investigation of this case ('PW12'), was admissible.

Held:

[1] Exhibit D43 was tendered to corroborate the evidence of the accused and must therefore satisfy the requirements of s. 157 of the Evidence Act 1950 ('the Act'). Since former statements under s. 157 of the Act must be proved by anyone to whom it was made, exh. D43 was inadmissible as PW12 was not recalled to formally tender it in evidence after the accused had given evidence on it. Even if it had been properly tendered before the court, there were parts of exh. D43 that contradicted the evidence of the accused, and this made exh. D43 inadmissible under s. 157 of the Act. Similarly, the prosecution's failure to refer the specific contradictory parts of exh. D43 to the accused meant that s. 145(1) of the Act had not been complied with, and this was a grave irregularity that rendered the contradictory part of exh. D43 inadmissible even for the purpose of affecting the credibility of the accused. (pp 324 f-g, 335 h & 336 a)

[2] On the evidence adduced, this court found that the accused was pulled out of the car and hit with the stick by the deceased resulting in the accused sustaining two injuries. Thus, the accused genuinely feared for his life and felt that the deceased was either going to grievously hurt or kill him, and also that the deceased might dislodge the gun from his hand and use it to shoot him. In the circumstances, the apprehension of danger that the accused had to his body and life was reasonable and he was, therefore, entitled to exercise his right of private defence. It made no difference that: (i) the deceased was armed with a stick and the accused with a gun; (ii) serious injuries need not be inflicted before the right of private defence could begin; (iii) it was not the injuries already inflicted but the injury that may have been inflicted if the right was not exercised that must be considered; (iv) there was no obligation on the accused to run away from the danger that he was facing; (v) the accused may turn around and attack in the face of danger; and (vi) that a gun may be used in private defence and that the right extended even to the killing of the aggressor. Hence, the accused had proved, on a balance of probabilities, that he had acted in the exercise of the right of private defence and had not committed any offence. (pp 339 d, 341 e, 348 c & 349 a, c-e)

[Accused acquitted.]

Case(s) referred to:

Alliedbank (M) Bhd v. Yau Jiok Hua [1998] 2 CLJ 33 HC ***(refd)***
Amrit v. Sadashiv AIR [1944] Bom 233 ***(refd)***
Bal Gangadhar Tilak v. Shrinivas AIR [1915] PC 7 ***(refd)***
Beckford v. R [1987] 3 All ER 425 ***(foll)***
Bhagwan Singh v. The State of Punjab [1952] SCR 812 ***(foll)***
Bharat Singh v. Bhagirati AIR [1966] SC 405 ***(refd)***
Bhojraj v. Sitaram AIR [1936] PC 60 ***(refd)***
Binay Kumar Singh v. State of Bihar [1997] 1 SCC 283 ***(refd)***
Charandesi Debi v. Kanai Lal AIR [1955] Cal 206 ***(refd)***
Chong Khee Sang v. Pang Ah Chee [1984] 1 MLJ 377 ***(refd)***
Chua Beow Huat v. PP [1970] 2 MLJ 29 ***(refd)***
De Silva v. PP [1964] MLJ 81 ***(refd)***
Emperor v. Ajit Kumar Ghosh AIR [1945] Cal 159 ***(refd)***
Emperor v. Rasul Bux AIR [1942] Sind 122 ***(refd)***
Goh Beng Seng v. Dol Dolah [1970] 2 MLJ 95 ***(refd)***
Govindan v. State of Kerala [1960] 47 AIR 258 ***(refd)***
Harkishen v. Pratap AIR [1938] PC 189 ***(refd)***
Heymerdinguer v. R 58 IC 344 ***(foll)***
Iman Din v. Emperor [1925] AIR Lahor 514 ***(refd)***
In re Grandhe Venkatasubbiah [1925] 86 IC 209 ***(refd)***
Jai Dev v. State of Punjab [1963] AIR SC 612 ***(refd)***
Karthiyayani & Anor v. Lee Leong Sin & Anor [1975] 1 MLJ 119 ***(refd)***
Kesha v. State of Rajasthan [1993] Cri LJ 3674 ***(refd)***
Khoon Chye Hin v. PP [1961] MLJ 105 ***(refd)***
Kwang Boon Keong Peter v. PP [1998] 2 SLR 592 ***(refd)***
Lee Thian Beng v. PP [1972] 1 MLJ 248 ***(foll)***
Lim Heng Soon & Anor v. PP [1970] 1 MLJ 166 ***(refd)***
M M Chetti v. C Coomaraswamy AIR [1980] Mad 212 ***(refd)***
Mangru v. Shivanand AIR [1923] All 575 ***(refd)***
Misri v. Emperor AIR [1934] S 100 ***(refd)***
Miyana Hasan Abdulla v. State of Gujarat AIR [1962] Guj 214 ***(refd)***
Mohd Khan v. State of Madhiya Pradesh [1972] Cri LJ 661 of 662 ***(foll)***
Mohd Ramzani v. State of Delhi [1980] Cri LJ 1010 ***(foll)***
Moreton v. Moreton [1937] 1 All ER 470 ***(refd)***
Mt Hakima v. Mt Jiandi AIR [1927] Sind 209 ***(refd)***
Muharram Ali v. Barkat Ali AIR [1930] Lah 695 ***(foll)***
Munia v. Manohar AIR [1941] Or 429 ***(refd)***
Muniandy & Ors v. PP [1966] 1 MLJ 257 ***(refd)***
Musa Yusof v. PP [1953] MLJ 70 ***(refd)***
Muthu Goundan v. Chinniah AIR [1937] M 86 ***(refd)***
Muthusamy v. PP [1948] MLJ 57 ***(refd)***

Nahar Singh v. Pang Hon Chin [1986] 2 MLJ 141 ***(refd)***
Nistarini v. Nando Lal 5 CWN xvi ***(refd)***
Noliana Sulaiman v. PP [2001] 1 CLJ 36 HC ***(refd)***
Palmer v. R [1971] 1 All ER 1077 of 1085 ***(refd)***
Panji v. S AIR [1965] Or 205 ***(refd)***
Paul v. State of Tripura [1993] 2 Gau LR 395 ***(refd)***
PP v. Abang Abdul Rahman [1982] 1 MLJ 346 ***(refd)***
PP v. Dato' Seri Anwar Ibrahim (No 3) [1999] 2 CLJ 215 HC ***(foll)***
PP v. Datuk Hj Harun Hj Idris [1977] 1 MLJ 14 ***(refd)***
PP v. Datuk Hj Harun Hj Idris & Ors [1977] 1 MLJ 180 ***(refd)***
PP v. Datuk Hj Harun Hj Idris (No 2) [1977] 1 MLJ 15 ***(refd)***
PP v. Lee Poh Chye & Anor [1997] 4 MLJ 578 HC ***(refd)***
PP v. Lee Twe Jeat [1994] 3 SLR 219 ***(refd)***
PP v. Lin Lian Chen [1992] 4 CLJ 2086; [1992] 1 CLJ (Rep) 285 ***(refd)***
PP v. Mohamed Ali [1962] MLJ 257 ***(refd)***
PP v. Ngoi Ming Sean [1982] 1 MLJ 24 ***(foll)***
PP v. Teo Eng Chen & Ors [1988] 1 MLJ 156 ***(foll)***
PP v. Yeo Kim Bok [1971] 1 MLJ 204 ***(foll)***
R v. Collin Chisom [1963] 47 Cri App 130 ***(foll)***
R v. Conlon [1993] 69 Crim R 92 ***(refd)***
R v. Georgiev [2001] 119 A Crim R 363 ***(refd)***
R v. Gillespie [1967] 51 Cr App R 172 ***(refd)***
R v. Kilbourne [1973] AC 729 ***(refd)***
R v. Mc Innes [1971] 3 All ER 295 ***(refd)***
R v. Turner [1975] 1 All ER 70 ***(refd)***
Raghuraj v. R AIR [1934] All 956 ***(refd)***
Ram Pratap v. S AIR [1963] Pat 153 ***(refd)***
Ramratan v. State AIR [1962] SC 424 ***(refd)***
Re Amnu Pujary [1942] 43 Cri LJ 753 ***(foll)***
Rutherford v. Richardson [1923] AC 1 ***(refd)***
Saludin Surif v. PP [1997] 3 CLJ 529 CA ***(refd)***
Samuel v. R AIR [1935] All 935 ***(refd)***
Sita Ram v. Ramchandra [1977] SC 1712 ***(refd)***
Sitaram v. Emperor [1925] 26 Cri LJ 587 ***(refd)***
Soosay v. PP [1993] 3 SLR 272 ***(refd)***
Sris Chandra Nandy v. Rakhlananda AIR [1941] PC 16 ***(refd)***
State of UP v. Ram Swarup [1974] Cri LJ 1035 ***(foll)***
Tan Chow Soo v. Ratna Ammal [1969] 2 MLJ 49 ***(refd)***
Tham Kai You & Ors v. PP [1977] 1 MLJ 174 ***(refd)***
Tham Kishun v. Kausal Kishore AIR [1958] Pat 294 ***(refd)***
Taylor v. Williams 3 B & Ad 845 ***(refd)***
Tony Beliang v. PP [2003] 1 CLJ 482 HC ***(refd)***
Tsia Development Enterprise Sdn Bhd v. Awang Dewa [1984] 1 MLJ 301 ***(refd)***
Ugar v. State of Bihar AIR [1965] SC 277 ***(refd)***
Upendra v. Phupendra 21 CWN 280 ***(refd)***

Venkatapathiraju v. Venkatanarasimha AIR [1936] PC 264 ***(refd)***
Von Starck v. The Queen [2000] 1 WLR 1270 ***(refd)***
Wan Nafi Wan Ismail v. Hjh Lijah Omar & Ors [1996] 5 MLJ 534 HC ***(refd)***
Wassan Singh v. State Punjab [1996] Cri LJ 878 ***(refd)***
Willis v. Bernard [1932] 8 Bing 376 ***(refd)***
Wong Swee Chin v. PP [1981] 1 MLJ 212 ***(refd)***
Ya Daud v. PP [1996] 2 CLJ 540 HC ***(foll)***
Zecevic v. DPP [1987] 162 CLR 645 ***(refd)***

Legislation referred to:
Criminal Procedure Code, ss. 112, 113
Evidence Act 1950, ss. 17, 145(1), 146, 155(c), 157, 165
Penal Code, ss. 96, 97, 99, 100, 102, 302

Evidence Act [India], s. 157

Other source(s) referred to:
Cross on Evidence, 6th edn, p 54
ERSR Coomaraswamy, *The Law of Evidence*, vol II Book 2, pp 750, 752
Graham Roberts, *Evidence: Proof and Practice*, p 73
Field's Law of Evidence, 12th edn, vol 1, pp 421, 423
Field's Law of Evidence, 12th edn, vol 5, p 4924
Mallal's Penal Law, p 134
Monir, *Law of Evidence*, 10th edn, vol 2, p 1496
Sarkar on Evidence, 15th edn, vol 1, p 87
Sarkar on Evidence, 15th edn, vol 2, pp 2226, 2282

Reported by Suresh Nathan

JUDGMENT

Augustine Paul J:
The accused was charged with an offence under s. 302 of the Penal Code in the following terms:

> Bahawa kamu pada 7.6.2002 jam lebih kurang 4.30 petang, bertempat di Jalan Maarof, Bangsar di dalam daerah Brickfields, di dalam Wilayah Persekutuan Kuala Lumpur telah melakukan satu pembunuhan dengan menyebabkan kematian ke atas Gobala Krishnan a/l Rajamugundan, (No Kad Pengenalan: 690311-07-5247), dan oleh yang demikian kamu telah melakukan satu kesalahan yang boleh dihukum di bawah Seksyen 302 Kanun Keseksaan.

He claimed trial to the charge. In support of its case the prosecution called a total of 12 witnesses. They are the police personnel involved in the investigation of this case, namely, Amran bin Idris (PW1), Tai Boon Hoo (PW2), Shamsudin bin Satar (PW3), Abdul Mujib bin Hj Mohd Ali (PW6), Ahmad Fadil bin Mohd Pakeh (PW7), Isa bin Mohd Azahari (PW8), Razimi bin Ahmad (PW11), Thomas Woon Wei Chiow (PW12); the two eye witnesses to the incident Syed Nasir bin Syed Husin Affandi (PW9), Amran bin Shariff (PW10); the medical assistant who went to the scene of the incident Abdul Razak bin Sulaiman (PW4) and James Andrew a/l Anthony (PW5), the brother-in-law of the deceased.

On 7 June 2002 PW9 worked as a salesman in Syarikat Citroen which is at 45, Jalan Maarof, Jalan Bangsar, Kuala Lumpur. At about 4.30pm on that day he was in the show room of the shop. As he said:

> Di tangan saya ada trade plate kenderaan dan semasa saya meletakkan trade plate itu di bawah rak TV saya memandang ke jalan raya dan semasa itu saya terlihat sebuah kereta berwarna emas sedang berhenti di seberang jalan menghala ke Bangsar di persimpangan Jalan Tempenis di lorong kedua. Saya terlihat di kereta itu di bahagian penumpang hadapan seorang lelaki berhelmet berada di sisi kereta tersebut dan kelihatan yang memakai helmet itu sedang bertengkar. Kemudian saya lihat seorang lelaki berjambang keluar dari kereta tersebut. Di tangan kanannya terdapat pistol. Semasa itulah saya menjerit pada kawan-kawan saya 'Ooi. Pistol. Pistol.' Kemudian saya ke depan pintu showroom dan kelihatan lelaki berjambang itu mengambil langkah ke belakang dan melepaskan satu das tembakan ke udara. Kemudian lelaki yang berhelmet itu berlari ke arah Jalan Tempenis dan kembali semula ke arah kereta tersebut dan berhenti dalam jarak lebih kurang 5 kaki dari bonnet hadapan kereta itu. Semasa itu saya terlihat lelaki berhelmet itu memegang sebatang kayu dan mengikut pergerakan mereka pada masa itu. Pertengkaran masih berlaku. Tiba-tiba lelaki berjambang itu melepas tembakan ke arah lelaki berhelmet. Kemudian saya pun melintas jalan dan saya melihat lelaki yang berhelmet itu kembali ke motosikalnya. Dia duduk di sisi motornya. Kemudian dia mengeluarkan helmetnya dan terbaring di situ. Selepas itu saya lihat itu adalah seorang lelaki India. Kemudian saya pun balik semula ke showroom saya.

In further describing the circumstances in which the second shot was fired he said:

> Semasa lelaki berhelmet datang memegang kayu lelaki berjambang itu memegang pistol di hadapan dadanya. Kemudian dia letak tangan yang berpistol itu di atas pintu kereta yang terbuka pada masa itu. Keadaan lelaki berjambang bila dia lepaskan tembakan kedua ialah lurus menghala ke lelaki berhelmet itu. Sebelum tembakan kedua lelaki berhelmet itu datang ke arah kereta dan berhenti di hadapan kereta dengan sebatang kayu di tangan. Dia

memegang kayu di bawah bahagian tengah kayu. Dia tidak menggunakan kayu untuk memukul lelaki berjambang. Semasa tembakan kedua saya lihat lelaki berhelmet itu sedang memegang kayu ke bawah dan semasa itulah tembakan kedua dilepaskan. Pada masa itu yang memisahkan mereka adalah pintu kereta. Cermin pintu itu dalam keadaan tutup. Masa di antara tembakan pertama dan kedua ialah lebih kurang 10-15 saat. Semasa tembakan kedua dilepaskan lelaki berhelmet sudah berhenti di hadapan kereta. Di sebelah kiri bonnet hadapan. Pada bila-bila masa saya tidak melihat kayu yang dipegang oleh lelaki berhelmet mengena badan lelaki berjambang.

As he said further:

Masa tembakan kedua jarak di antara lelaki berjambang dan lelaki berhelmet ialah lebih kurang 10-12 kaki. OKT terus keluar sendiri dari kereta. … Masa bertengkar kayu was moving up and down. At the time of the shooting he was holding the stick down. Sebelum tembakan kedua dan semasa tembakan kedua dilepaskan OKT berada di belakang pintu hadapan kereta. … Pada mula-mula saya nampak pistol tangan OKT ke atas menghala ke udara. Saya tengok tangan keluar dahulu dengan pistol. Selepas itu sahaja saya nampak badannya keluar dari kereta. Lelaki itu pakai helmet warna putih.

In his cross-examination PW9 said that he saw the car coming to a halt. He saw the person in helmet first. That person was standing beside the front passenger seat door of the car. The door was closed. PW9 then said:

Kalau seseorang seperti orang yang bertopi keledar berdiri betul-betul di tepi pintu penumpang hadapan boleh nampak bahu ke atas (shoulder ke atas). Bahu ke bawah saya tidak boleh nampak. Kalau orang bertopi keledar membuka pintu penumpang hadapan saya setuju saya tidak boleh nampak.

In answer to further questions he said:

Saya pasti saya nampak tangan keluar dahulu. Yang pakai topi keledar betul-betul di tepi pintu hadapan penumpang. Semasa tangan keluar dari kereta orang yang pakai topi keledar berundur sedikit. Saya setuju bahawa jika OKT ditarik keluar dari kereta saya tidak boleh nampak.

Simati balik dengan sebatang kayu. Pada masa itu saya nampak OKT dan simati bertengkar bersungguh. Bertengkar mulut sahaja. Apabila pistol keluar masa itu pun masih bertengkar. Sebelum keluar pistol saya tak lihat pertengkaran. Pertama kali saya nampak saya nampak pistol keluar dari pintu kereta. Simati ada di tepi pintu. Visor helmet buka dan boleh nampak muka. Saya nampak muka simati dalam keadaan marah. Dia berkata-kata sesuatu. Selepas tembak OKT tunjuk pistol ke arah simati. Simati lari ke arah motornya. Saya nampak dia kembali. Di tangannya ada sebatang kayu. Saya tak nampak di mana dia ambil kayu tersebut. Saya berterusan melihat simati. Saya boleh nampak motosikal. Saya tidak setuju keterangan saya karut.

Di antara tembakan satu dan dua beberapa saat sahaja. Saya tidak tahu dari mana kayu didapati oleh simati. Saya tak setuju kali pertama saya sedar apa yang berlaku apabila saya dengar bunyi tembakan. Kali pertama saya tak nampak apa-apa di tangan simati.

Semasa itu semua lihat World Cup di TV. Masa saya depan TV saya nampak pistol sudah keluar dari pintu Mercedes. Kemudian saya lari ke arah pintu.

PW9 was questioned on what he had told the police. The questions and answers run as follows:

Saya ada beri statement kepada polis kurang dari seminggu dari hari kejadian. Saya tak ingat.

S: Adakah kamu beritahu polis bahawa saya menjerit 'Pistol. Pistol' hanya selepas mendengar dan melihat tembakan pertama?

J: Tidak.

S: Awak mahu check statement sama ada beritahu polis macam itu?

(DPP rujuk statement kepada saksi)
(Saksi baca statementnya)

J: Saya memberitahu polis macam itu.

S: Saya cadangkan bahawa En Nasir telahpun menceritakan kepada polis bahawa lelaki yang berjambang keluar tembak kali pertama dan selepas itu kamu menjerit 'Pistol. Pistol'.

J: Tidak.

S: Benar atau tidak En Nasir mengatakan kepada polis bahawa dalam episod pertama tidak lihat pistol langsung. Hanya baru nampak pistol apabila simati kembali dengan kayu.

J: Tidak.

S: Apa yang saya kata adalah apa En Nasir sebut kepada polis.

J: Tidak benar.

And further on the same issue:

Jarak di antara OKT dan simati lebih kurang 10 kaki. Dari jarak itu tembakan kedua dibuat.

S: Adakah En Nasir pernah mengatakan jarak kedua-nya semasa tembakan kedua 4-5 kaki?

J: (Witness wishes to check his police statement) Benar, saya ada kata jarak keduanya ialah 4-5 kaki. (Witness asked to demonstrate how deceased was holding stick) Saya tak pasti dia pegang dari hujung mana. Kayu ini lebih kurang 4 kaki. Simati pegang dengan satu tangan. The reaching distance of the stick is about 5 feet. The reaching distance is not close to the face of accused. Dari posisi itu simati tidak boleh pukul OKT. Saya tak pasti sama ada saya ada beritahu polis simati acukan kayu ke arah muka OKT. (Witness refers to his statement on this point) (D/C told that this line of questioning is irregular.)

S: En Nasir ada beritahu polis bahawa simati ada mengacukan kayu itu ke muka OKT.

J: Ada.

S: Kenapa tidak beritahu sebegitu semasa di Mahkamah?

J: Kerana walaupun dia acu ke arah OKT jaraknya masih ada jarak.

S: En Nasir saya cadangkan sejurus sebelum tembakan kedua berlaku jarak diantara keduanya membolehkan simati memukul tertuduh dengan kayu.

J: Saya tak setuju.

S: Masa tembakan kedua cerita keadaan badan simati.

J: Dia berdiri tegak sambil memegang kayu yang dihalakan ke bawah. The right hand holding the stick was completely down. Arah tembakan ialah direct. Saya pasti dia berdiri tegak. He was squarely facing the accused.

S: Itu bukan position simati sebelum tembak. He was holding the stick with both hands and was bent a little and was aiming with the stick.

J: Saya tidak setuju.

S: Bullet masuk dari kanan ke kiri. Oleh kerana itu position cannot be challenged.

J: Saya tak setuju.

Dari segi showroom simati lebih hadapan di Jalan Bangsar. Showroom is not directly facing the junction. (Saksi dirujuk kepada ID22)

Saya boleh nampak terus dari showroom. Saya tak pasti sama ada pada satu ketika ada gaya-gaya dari OKT yang menunjukkan beliau cuba mententeramkan keadaan pertengkaran tersebut. Saya tak pasti mungkin tak nampak. Selepas tembakan pertama saya tak pasti jika ada gaya-gaya dari simati yang menunjukkan dia mencabar OKT untuk tembak. Sungguh pun OKT telahpun menembak sekali ke atas simati tidak langsung nampak gentar. Simpulan saya ialah tembakan pertama ialah tembakan amaran.

Saya tidak nampak masa pertengkaran simati menjolok-jolokkan kayu ke dada OKT. Saya tidak nampak simati pukul OKT dengan kayu. Saya setuju P11 boleh membawa cedera parah jika dihentam di kepala dan mungkin boleh bawa mati.

Saya rasa cemas pada masa itu. Saya nampak kedua orang pun nampak macam cakap. Kemarahan nampaknya macam tidak boleh dikawal.

In answer to the position of the helmet and the motorcycle after the shooting incident he said:

(Saksi dirujuk kepada P4)

Saya setuju di P4A simati terbaring di belakang motosikal. Helmet tidak di sekitar badannya. Di P4C dan D helmet itu nampak tergantung di cermin belakang motosikal. Saya lihat helmet dan motosikal ditolak ke hadapan oleh seorang lain. Saya tidak cerita ini kepada polis. Motor ditolak ke hadapan dari tepi persimpangan. (Saksi diminta tanda X kedudukan motosikal pada asalnya di P4C) Di X adalah bahagian tayar hadapan. Saya tidak tahu kenapa motosikal ditolak. Saya tak tahu siapa tolak motosikal. Saya setuju tempat baru motosikal lebih menghalang kenderaan dari tempat asal. Badan simati tidak diubah. Saya tak pasti. Setakat yang saya ingat badan itu macam itu.

S: Saya cadangkan helmet dan motosikal seperti di P4C sebelum pertengkaran bermula dekat kereta Mercedes.

J: Tidak.

Selepas kejadian kereta jalan sedikit ke hadapan. Dia keluar dari kereta dan lihat badan simati. Saya tidak cerita ini kepada polis. Benar, saya tidak ceritakan kepada polis bahawa selepas dia masuk dalam kereta dia tidak berhenti sekali lagi dekat dengan badan simati. Saya tak pasti sama ada OKT ada kata 'Panggil ambulans'.

S: Ada satu ketika simati memegang kayu itu di mana hujung kayu dekat dengan muka OKT.

J: Tidak. Boleh ulang soalan?

– Peguam ulangi soalan.

J: Tidak. Keadaan kayu tidak dekat dengan muka OKT.

S: Berapa dekat?

J: Dia berdiri. Jarak kurang dari 10 kaki. Simati berada 4-5 kaki sebelum bonnet kereta. OKT di belakang pintu. Pada setiap masa OKT berada di belakang pintu. Itu yang paling dekat di antara kedua orang itu.

In answer to further questions he said:

S: En Nasir saya cadangkan sejurus sebelum tembakan kedua berlaku jarak diantara keduanya membolehkan simati memukul tertuduh dengan kayu.

J: Saya tak setuju.

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J: Saya tak setuju.

Dari segi showroom simati lebih hadapan di Jalan Bangsar. Showroom is not directly facing the junction. (Saksi dirujuk kepada ID22)

Saya boleh nampak terus dari showroom. Saya tak pasti sama ada pada satu ketika ada gaya-gaya dari OKT yang menunjukkan beliau cuba mententeramkan keadaan pertengkaran tersebut. Saya tak pasti mungkin tak nampak. Selepas tembakan pertama saya tak pasti jika ada gaya-gaya dari simati yang menunjukkan dia mencabar OKT untuk tembak. Sungguh pun OKT telahpun menembak sekali ke atas simati tidak langsung nampak gentar. Simpulan saya ialah tembakan pertama ialah tembakan amaran.

Saya tidak nampak masa pertengkaran simati menjolok-jolokkan kayu ke dada OKT. Saya tidak nampak simati pukul OKT dengan kayu. Saya setuju P11 boleh membawa cedera parah jika dihentam di kepala dan mungkin boleh bawa mati.

Saya rasa cemas pada masa itu. Saya nampak kedua orang pun nampak macam cakap. Kemarahan nampaknya macam tidak boleh dikawal.

In his re-examination PW9 said:

Semasa pertengkaran keadaan OKT ialah dia marah juga. Saya tidak nampak kayu yang dipegang oleh simati kena sipi-sipi pada muka tertuduh. Kedai Citroen bertentang dengan jalan raya dan tinggi sedikit daripada jalan raya. Dari dalam kedai saya boleh nampak dengan jelas apa yang berlaku di tempat kejadian. Cermin kereta Mercedes itu cerah dan tidak gelap sangat. Saya boleh

nampak pemandu kereta. Semasa OKT kata 'Balai cerita' keadaannya ialah biasa sahaja. Semasa tembakan kedua dilepaskan jarak di antara simati dan tertuduh ialah lebih kurang 10 kaki. Saya tidak kenal OKT sebelum kejadian ini.

PW10 was employed in the same place as PW9 at the material time. In his evidence he said:

Pada waktu itu seorang teman saya Syed Nasir masuk ke dalam bilik pameran membawa trade plate untuk diletakkan di bawah meja TV. Selepas itu saya dengar Syed Nasir menjerit, 'Pistol Hoi Pistol'. Dan saya memandang ke luar bilik pameran dan nampak seorang lelaki sedang memegang pistol mengarah ke langit. Dan seorang lelaki India menuju ke arah lelaki yang memegang pistol. Bila saya nampak lelaki pegang pistol saya berada di luar bilik pameran di tepi jalan. Selepas saya dengar Syed Nasir menjerit, 'Pistol Hoi Pistol' saya terus meluru ke luar dari bilik pameran. Saya nampak seorang lelaki sedang memegang pistol. Sedang acukan pistol ke arah langit dan seorang lelaki India sedang memegang kayu menuju ke arah lelaki yang memegang pistol. Semasa saya meluru ke luar dari bilik pameran saya dengar satu das tembakan. Selepas saya mendengar satu das tembakan itu saya masih lagi berlari menuju ke arah lelaki yang melepaskan tembakan. Lelaki itu berada di sebelah kiri kereta berwarna emas. Kereta itu berada di Jalan Maarof berhadapan bilik pameran. Saya berlari menuju ke arah kereta. Ketika saya berada di atas pembahagi jalan saya nampak lelaki yang memegang pistol melepaskan tembakan ke arah lelaki India.

Waktu saya menuju ke kereta itu selepas tembakan pertama saya nampak lelaki yang memegang pistol itu mengacukan pistol ke arah lelaki India sambil bertengkar. Tetapi saya tidak dengar pertengkaran itu. Sebelum tembakan kedua lelaki India itu sambil bertengkar kayu itu diangkat ke atas dan ke bawah. Lelaki yang memegang pistol itu berdiri tepi pintu kereta di sebelah kiri. Pintu kereta itu terbuka. Cermin pintu kereta tutup. Sebelah tangan kanan lelaki sedang mengacukan pistol ke arah lelaki India. Tangan lelaki (yang pegang pistol) berada di atas pintu kereta. Lelaki India yang memegang kayu berada di sebelah kiri kereta di bahagian bonnet kereta.

Saya tahu mereka bertengkar kerana saya nampak mimik muka mereka dalam keadaan marah. Mereka bertengkar dengan kuat. Tetapi saya tidak dengar. Dalam beberapa saat sewaktu pertengkaran saya nampak lelaki yang memegang pistol melepaskan tembakan ke arah lelaki yang memegang kayu. Semasa tembakan kedua dilepaskan lelaki India berada di hujung hadapan kereta sebelah kiri. Semasa tembakan kedua lelaki India itu berundur. Just before the second shot mereka masih bertengkar. Kayu yang dipegang oleh lelaki India itu berada di bawah. Selepas itu baru saya dengar tembakan. Semasa tembakan kedua dilepaskan lelaki India berada di hujung kereta sebelah kiri

bahagian hadapan. Badannya tegak memandang hadapan ke arah lelaki yang memegang pistol. Semasa saya berada di atas divider itu saya tidak nampak lelaki India memukul lelaki yang memegang pistol pada bila-bila masa. Pada masa saya melihat lelaki India memegang kayu ke atas dan ke bawah saya lihat kayu itu tidak kena pada badan lelaki yang memegang pistol. Semasa tembakan kedua dilepaskan jarak di antara mereka saya tidak berapa pasti. Saya boleh tunjuk. (Witness points to a distance of about 10 feet) Selepas tembakan kedua dilepaskan lelaki India itu berundur, berpusing dan berjalan menuju ke arah motosikal yang diletakkan di tepi jalan di persimpangan Jalan Tempenis dan Jalan Maarof. Dia duduk sambil berlunjur dan membuka topi keledar dan terus rebah. Selepas itu lelaki yang melepaskan tembakan berjalan menuju ke arah lelaki India itu sambil berkata 'Biar biar balai cerita'. Pada masa itu saya berada betul-betul di hadapan kereta berwarna emas sambil memegang telefon dan cuba menghubungi 999. Selepas itu lelaki yang memegang pistol masuk ke dalam kereta. Kereta itu terus berlalu menuju ke Bangsar. Lelaki India terus terbaring di situ. Saya nampak kesan luka di sebelah bawah bahu sebelah kanan. Saya berlari ke pejabat Directional cuba menghubungi 999 dengan menggunakan telefon pejabat. Panggilan saya telah diterima oleh Balai Polis Travers. Saya memberitahu pegawai ada seorang lelaki India kena tembak dan perlukan bantuan. Pegawai itu telah mengambil butir-butir diri saya dan mengatakan bantuan akan tiba sebentar lagi. Saya ada maklumkan bahawa ada seorang lelaki berbangsa Sikh menembak seorang lelaki India.

Pada masa itu keadaan jalan raya ke Bangsar menuju ke Pusat Bandar lengang. Tiada kereta. Manakala jalan di tempat kejadian berlaku jam. Ada dua lorong di sana. Kereta emas ada di lorong kedua berhadpan dengan simpang Jalan Tempenis. Kereta di lorong pertama boleh jalan. Kereta di lorong kedua berhenti. Masa itu telah ada orang ramai di Jalan Tempenis dan juga di Stesyen Minyak. Terdapat orang di tempat lelaki India berada. Orang-orang itu ada melihat kejadian.

With regard to the point of time at which the accused was holding the stick he said further:

Saya nampak seorang lelaki India sedang menuju ke arah lelaki yang memegang pistol. Lelaki India sedang memegang kayu. Ini adalah selepas tembakan pertama dilepaskan.

He said that the deceased was wearing the helmet from the time he was arguing with the accused. In further commenting on the stick that the deceased was holding he said:

Semasa bertengkar dan sepanjang masa sehingga tembakan kedua simati memegang kayu somewhere at a point three-quarters from the front. He was moving it up and down. Hujung kayu yang bergerak atas dan bawah adalah jauh dari muka tertuduh. This was just before the second shot. Pada masa itu tertuduh dan simati dipisahkan oleh pintu kereta berwarna emas.

In his cross-examination as to the point of time when the deceased was holding the stick PW10 said:

> Saya ada dengar bunyi tembakan pertama. Bunyi itu bukan terlalu kuat tetapi boleh dengar. Apabila saya dengar bunyi tembakan pertama saya berada di luar showroom. Saya sudah menghampiri tepi jalan. Saya ada nampak simati menuju ke arah OKT dengan memegang kayu. Saya beritahu Mahkamah semalam ini adalah selepas tembakan pertama. Pada kali pertama saya nampak simati ialah pada masa dia berjalan menuju kepada OKT. Pada masa itu jarak di antara simati dan OKT ialah 15-16 kaki. (Witness demonstrates the distance) Pada masa itu OKT sedang mengacukan pistol ke arah simati.

He then said:

> Semalam awak kata, 'Selepas itu saya dengar Syed Nasir menjerit, "Pistol, Hoi, Pistol" dan saya memandang ke arah luar bilik pameran dan nampak seorang lelaki sedang memegang pistol mengarah ke langit dan seorang lelaki India menuju ke arah lelaki yang memegang pistol.' Saya setuju itu benar berlaku. Bila saya nampak lelaki India itu dia masih pegang kayu itu ke arah bawah. Saya nampak lelaki India angkat kayu atas dan bawah semasa mereka bertengkar. Pada masa itu jarak di antara OKT dan saya ialah jarak tiga kereta. Saya tidak boleh dengar pertengkaran. Sedekat-dekat yang saya berada kepada OKT ialah 4 kaki. When I was at the divider the distance between me and the accused was the distance of one car sideways. Masa itu pun saya tidak dengar pertengkaran. Pada masa itu simati lebih jauh daripada OKT dengan jarak OKT dan saya.

In further commenting on the movement of the stick that the deceased was holding he said:

> The deceased was not really raising the stick up and down vigorously. I am not sure whether there were times the deceased took positions as though he was going to strike.
>
> Q: I have reason to believe that you stated to the police that the deceased took a position as though he was going to strike.
>
> A: Tiada.
>
> He was quarrelling with the stick up and down. I did not say that he held the stick as though he was going to strike.
>
> The police took statements from me twice. The second statement was taken 2-3 weeks from the incident. I could be wrong. After that no other statements were taken. Each time I gave a statement I came back and told my friends what I said.

Q: Did you not tell the police that the stick was lifted by the deceased to the face of the accused?

A: I said that.

Even at the distance between the two of them it can be described as the deceased lifting the stick to the face. I still deny that the deceased had taken a position as if he was going to hit accused.

He did not agree that the deceased was not wearing his helmet during the incident. He also said that he does not agree that the deceased pulled out the accused from the car. In his re-examination PW10 said:

Semasa pertengkaran di antara OKT dan simati tangan OKT yang memegang pistol berada di atas pintu kereta sebelah kiri. Semasa tembakan kedua dilepaskan tangan OKT yang memegang pistol masih di atas pintu kereta di sebelah kiri.

PW1 received information from PW10 about the incident at 4.40pm. He notified the Bilik Gerakan and made a police report (exh. P3). PW5 was then informed of the incident. He went to the scene with a team of police officers including PW12. PW5 took possession of various exhibits including a stick (exh. P11), a helmet (exh. P12) and a motorcycle (exh. P13). The body of the deceased was sent to the University Hospital for a post-mortem by PW8. PW2 was instructed to take photographs (exh. P4 A-G) at the scene by PW12. PW3 took photographs (exh. P5 A-V) of the deceased at the University Hospital on the instructions of PW12. PW5 identified the deceased in the mortuary of the University Hospital as his brother-in-law by the name of Gobala Krishnan a/l Rajamugundan. PW7, a corporal, was on duty at the Balai Polis Pantai. The accused went there at about 5.15pm to lodge a report and handed his pistol (exh. P15) to PW7. As PW7 said in his evidence:

Kemudian lelaki Singh itu beritahu saya di mana dia telah lepaskan dua das tembakan terhadap satu lelaki India di pam minyak Petronas, Jalan Maarof, Bangsar kerana lelaki India tersebut telah memukulnya dengan kayu cuba hendak menyamunnya.

He had made a record of this in the station diary (exh. P14). When cross-examined on the entries he had made in exh. P14 PW7 said:

Saya buat catatan selepas saya serahkan pistol dan dokumen kepada Sjn Isa. Apa yang saya tulis adalah apa yang saya ingat. Tertuduh beritahu apa yang berlaku. Saya tulis apa yang saya ingat. Setakat apa saya ingat saya tulis.

PW12 said in his evidence:

> Pada jam 4.57 petang saya bersama-sama ASP Mujib, K/Insp Azahar dan jurugambar L/Kpl Tai menghala ke tempat kejadian. ASP Mujib ialah SP6. L/Kpl Tai ialah SP2. Kami sampai di tempat kejadian jam lebih kurang 5.05 petang. Tempat kejadian adalah di simpang Jalan Tempenis dan Jalan Maarof, Bangsar. Saya dapati ada satu lelaki India dalam keadaan terbaring di atas jalan, Jalan Tempenis berdekatan dengan simpang Jalan Maarof. Di hujung kakinya ada sebatang kayu dan berdekatan dengan simati sebuah motosikal no WFY 6157 jenis Honda EX5. Saya terus menjalankan siasatan dengan memeriksa lelaki India itu di mana saya dapati dia berpakaian baju T-berkolar warna putih, seluar panjang warna putih, berkasut dan pemeriksaan lanjut didapati ada kesan luka tembakan di bahu kanan dekat dengan armpit. Saya juga dapati baju dekat bahu kanan yang mana terdapat kesan luka ada kesan lubang dan kesan darah. Saya seterusnya memeriksa untuk mendapatkan dokumen kenal diri lelaki tersebut dan dapati tiada memiliki kad pengenalan ataupun lesen memandu. Lelaki itu didapati tidak bernafas dan dipercayai telah meninggal dunia. Lelaki itu tidak memakai topi keledar. Topi keledar itu ada tersangkut di rear mirror motosikal. Oleh kerana masa itu tiada terdapat maklumat yang apa jenis senjata yang digunakan kita telah buat pemeriksaan di sekitar kawasan untuk mencari jika ada casing peluru. Kita juga buat pemeriksaan di sekitar kawasan dan mendapati di dua belah tepi Jalan Tempenis terdapat pokok-pokok yang mana juga didapati di bawah pokok-pokok ada kayu-kayu dahan yang dipotong. Oleh kerana pada masa itu kita tidak dapat tahu butir simati, telah buat semakan dengan motosikal didapati motosikal dilapor hilang bersabit Setapak Report 1986/02.

With regard to injuries on the accused he said:

> Dato Balwant Singh ada mengadu yang dia ada sakit kerana kena pukul. Saya buat pemeriksaan dan didapati ada sedikit kemerahan di lengan atas tangan kiri (upper arm). Dan juga ada sedikit kemerahan di dada. Oleh kerana OKT telah mengadu saya telah arahkan Insp Arshad untuk bawa OKT untuk diperiksa dan di samping itu untuk mengambil contoh darah.

PW12 served a copy of the post-mortem report of the deceased on the accused on 29 November 2002 (exh. P33). In his cross-examination PW12 said that he found branches similar to exh. P11 below the trees in Jalan Tempenis. They were on the ground. They had been pruned and cut. The nearest place where he found them was about 40 feet from the motorcycle. He recorded a statement from the accused under s. 112 of the Criminal Procedure Code. The defence then applied for the statement to be tendered in evidence. The prosecution objected on the ground that it is privileged. The defence said that it is required to show consistency as it is contemporaneous to the incident and contended that it is admissible under s. 113 of the Criminal Procedure Code as it refers

to "any statement" made by a person and referred to *PP v. Datuk Haji Harun bin Haji Idris* [1977] 1 MLJ 14 in support. I overruled the objection raised by the prosecution and duly admitted the statement in evidence (exh. D43). PW12 then said that from the beginning when he met the accused he claimed that what he did was in self-defence. He also said that he was aware that the deceased was detained in Simpang Rengam under the Emergency Ordinance in 1993, 1995 and 1997 for being involved in secret society activities. After his release in 1997 he was restricted to Pasir Putih for two years. His body had tattoos which are significant to secret societies. The motorcycle that the deceased was riding had been reported stolen on 8 March 2002. He then said:

> The distance from the front bonnet of the car to the motorcycle is about 10 metres. The distance from the bonnet to the nearest tree where the branches were found is less than 40 feet.

In his re-examination upon being referred to exh. P4D he said:

> Dalam gambar ada daun-daun. Daun-daun ini dari pokok. There is a tree near the leaves. There were branches under that tree. That was the nearest tree to the deceased and the motorcycle. The distance between the deceased and the tree is about 10 feet. To the motorcycle it is extra another foot or two. Simati tiada sabitan lampau. Saya tidak tahu siapa yang curi motosikal itu. Tiada mana-mana bahagian kereta Mercedes yang dented.

The prosecution then closed its case. The defence elected not to make a submission of no case. The evidence of PW9 and PW10 show that the accused shot at the deceased at close range with his pistol, after having fired a warning shot, as a result of which the deceased died. This is not challenged by the defence. What is in some dispute is the sequence of events that happened prior to the firing of the fatal shot which I shall consider now.

The Point Of Time At Which PW9 And PW10 Were First Attracted To The Incident

PW9 started off his examination-in-chief by saying that he saw the Mercedes Benz stop; a male person in helmet was at the front passenger seat arguing; the accused alighted from the car with a pistol in his right hand; and he shouted "Ooi. Pistol. Pistol". However, in his cross-examination, he said that he did not see anything in the accused's hand the first time. This inconsistency was not clarified by the prosecution during the re-examination of PW9. This makes it difficult to determine when exactly PW9 first saw the accused and, consequently, the point of time at which he shouted. PW10 was alerted to the incident by the shouting of PW9 which, following my earlier ruling, does not assist in making a determination this issue.

Thus it is my finding that it is difficult to determine the precise point of time at which PW9 shouted and thereby the time when PW9 and PW10 were first attracted to the incident. This means that the prosecution has not led prima facie evidence to identify the point of time at which PW9 and PW10 were first attracted to the incident. However, I must observe that PW9 admitted in cross-examination that he had stated in his statement to the police, after having perused it in court, that he first noticed what was happening after he had heard the first shot. I shall revert to this part of his evidence in a later part of the judgment.

Whether The Accused Was Pulled Out From The Car

PW9 said in the beginning of his examination-in-chief that he saw the accused coming out of the car with a pistol in his hand. Later on he said that the accused came out on his own. However, in his cross-examination he agreed that he could not see whether the person in helmet opened the door of the front passenger seat and whether the accused was pulled out from the car. He was not re-examined on this point. PW10, in his cross-examination, did not agree that the deceased pulled out the accused from the car. This is inconsistent with what he had said in his examination-in-chief that when he heard PW9 shouting he saw the accused holding a pistol. At that time the accused was outside the car. If that was the first point of time at which he saw the accused he could not have seen how the accused came out of the car.

It is therefore my finding that PW9 and PW10 did not know whether the accused was pulled out from the car.

The Point Of Time At Which The Accused Took Out The Pistol

In the light of my previous two findings the logical inference is that PW9 and PW10 did not know the point of time at which the accused took out the pistol.

Whether The Deceased Had The Stick With Him Before The First Shot Was Fired By The Accused

PW9 was firm in his evidence at all stages of his examination that the deceased took the stick only after the first shot was fired by the accused. The evidence of PW10 on this issue is different. In the beginning of his examination-in-chief he said:

> Sedang acukan pistol ke arah langit dan seorang lelaki India sedang memegang kayu menuju ke arah lelaki yang memegang pistol.

However, towards the end of the examination-in-chief he said:

> Saya nampak seorang lelaki India sedang menuju ke arah lelaki yang memegang pistol. Lelaki India sedang memegang kayu. Ini adalah selepas tembakan pertama di lepaskan.

In his cross-examination on the following day he said:

> Apabila saya dengar bunyi tembakan pertama saya berada di luar showroom. Saya sudah menghampiri tepi jalan. Saya ada nampak simati menuju ke arah OKT dengan memegang kayu. Saya beritahu Mahkamah semalam ini adalah selepas tembakan pertama.

PW10 has therefore clarified what he had said the previous day to confirm that the deceased had the stick with him before the firing of the first shot. PW10 was not re-examined on his clarification. It is therefore my finding that the evidence of PW10 is that the deceased had the stick before the firing of the first shot.

It follows that the prosecution evidence on this issue is contradictory.

The Manner In Which The Deceased Used The Stick Before The Two Shots Were Fired

PW9 said that when the deceased and the accused were arguing seriously the stick was moving up and down. He did not at any time see the stick come into contact with the accused. At the time of the second shot the deceased was holding the stick down. In his cross-examination he said that there was no occasion when the stick was near the accused's face. He admitted having stated in his statement to the police that the deceased pointed the stick at the accused's face. When asked why he did not say that in court PW9 said that even though the stick was so pointed the accused was still a distance away.

PW10 said that the deceased was holding the stick and going towards the accused. He was moving it up and down. They were arguing loudly. He did not at anytime see the deceased hitting the accused with the stick. In fact the stick did not touch the body of the accused at all. Initially he said that at the point of time of the second shot the deceased was holding the stick downwards. However, at the end of his examination-in-chief he said:

> Semasa bertengkar dan sepanjang masa sehingga tembakan kedua simati memegang kayu somewhere at a point three-quarters from the front. He was moving it up and down. Hujung kayu yang bergerak atas dan bawah adalah jauh dari muka tertuduh. This was just before the second shot.

He admitted in cross-examination that he told the police that the stick was lifted by the deceased to the face of the accused. But he denied that the deceased had taken a position as if he was going to hit the accused.

From an assessment of the evidence of PW9 and PW10 it is clear that the stick held by the deceased did not at any time touch the accused. But the deceased was moving the stick up and down and was pointing it towards the face of the accused. It follows that the stick was in various positions at different points of time and, obviously, was moving from one position to another. Thus it is not possible to place much emphasis on the evidence given that at the time of the second shot the stick was pointed downwards. My evaluation will be different if the evidence discloses that for a considerable length of time the stick was in that position before the firing of the second shot. That, however, was not the case.

Whether The Deceased Was Wearing His Helmet At The Time Of The Incident

Both PW9 and PW10 were firm in their evidence that the deceased was wearing his helmet at the time of the incident. I accept their evidence on this issue but I must observe that no evidence was led by the prosecution to explain how the helmet was found hanging on the rear view mirror of the motorcycle when the evidence adduced reveals that the accused collapsed near it. The nearest explanation came from PW9 who said that he saw someone pushing the helmet and the motorcycle to the front.

Events Preceding The Shooting Incident At The Junction Of Jalan Maarof/ Jalan Tempenis

The evidence of PW9 and PW10 is confined to only what transpired at the Jalan Maarof/Jalan Tempenis junction. Thus there is no evidence on record at this stage to show what occurred prior to this.

Even though there are discrepancies in the evidence of PW9 and PW10 they are not material enough to adversely affect their credibility. What is significant is that their evidence clearly shows that the accused shot at the deceased deliberately at close range with his pistol. The deliberate use of a dangerous weapon at another leads to the irresistible inference that it was done with the intention to cause death (see *Tham Kai You & Ors v. PP* [1977] 1 MLJ 174). Accordingly I was satisfied that the prosecution had made out a *prima facie* case and called upon the accused to enter his defence.

The accused elected to give evidence on oath. He called five witnesses. They are Sukhinderjit Singh (DW2) whom the accused telephoned on that day; Dr Myo Khine (DW3) who examined the accused on that day; Abdul Rahman bin Ismail (DW4) who witnessed the incident; Ranjit Kaur d/o Channan Singh (DW5), the daughter-in-law of the accused who was driving the car on that day and Norzilah binti Ismail (DW6), the sister of DW4.

The accused said that on 7 June 2002 he left his office at 4.20pm in his Mercedes Benz bearing registration number WD5. It was driven by DW5. As they were travelling towards Bangsar after having passed the KTM roundabout the deceased who was riding a motorcycle overtook them on the left. DW5 sounded the horn when a motor car came close to them. They then stopped a few cars behind the traffic lights near the Syariah Court as the traffic light was showing red. The deceased who was about 30 feet ahead of them turned and came to the driver's side of their car. DW5 brought the window screen down. As the accused said:

> Before we could say anything he started abusing by using vulgar words. He said, 'Bengali busuk, Bengali bitch, pukima'. Ranjit Kaur tried to explain that the hooting was not directed at him but at the car on our left. I too also told him the same thing. He just refused to listen. He kept on shouting vulgarities. I told him 'Pergilah'.

The light then turned green and they moved on. The accused then saw the deceased waiting at the bus stop near the museum. The deceased waved with his hand many times asking them to stop their car. They ignored him and carried on driving. Then they heard some sound from behind the car. The accused noticed the deceased near the rear mudguard of the car. The deceased then overtook them. The accused thought that he had gone off. At the junction of Jalan Travers and Brickfields the traffic light was showing red. As the accused said:

> We were then about 5-6 cars behind the traffic light. Again I saw that he had already reached the traffic lights. He then turned back and came towards my car. He came to the left hand side window. I then opened the window. He again started abusing. He said, 'Bloody Bengali, busuk Bengali, pukima, mari lawan.' I told him again that the horn was not directed at him. I told him, 'Pergi police station, boleh lawan.' He looked very angry and threatening.

When the traffic light turned green they started driving towards Bangsar. The deceased disappeared from their view. The accused thought that the deceased had gone. When they arrived at the junction of Jalan Bangsar and Jalan Maarof the traffic light was again showing red. At that time the accused and DW5

were about six to seven cars behind the traffic lights. When the light turned green they started moving. When they arrived at the junction of Jalan Bangsar and Jalan Maarof the light turned red again. Their car was the first car at the junction. The deceased was waiting at the junction on the left. When the light turned green they could not move as the deceased was in front of them. He was shouting and using abusing language. When somebody from behind hooted the deceased began to move away. When they were about 30 feet away from the Petronas Petrol Station DW5 gave a signal to turn left into Jalan Tempenis. The traffic was slow as the road was congested. The deceased had reached the junction of Jalan Tempenis and was looking behind every now and then. The accused then said:

> I believed that when he saw our signal he also went up Jalan Tempenis. I told Ranjit Kaur not to turn into Jalan Tempenis but to go straight towards the mosque as I was afraid that if I turn into Jalan Tempenis and go to my house he would follow me there. As our car was slowly moving I saw the motorcyclist had gone up Jalan Tempenis and picked up a piece of wood. He picked it up from the left hand side of the road nearer the petrol station. The place from where he picked up the wood could be about 30-40 feet from the junction. The motorcyclist, after picking up the wood, did a U-turn and came round to the right hand side of the junction. He parked his motorcycle at the junction. (Saksi dirujuk kepada P4 C and D) The motorcycle is the one nearest to the person lying down in P4C. By that time we came almost to the centre of the junction. (Witness referred to P22) (Witness asked to mark position of his car) I was at position marked Y.
>
> Then I saw the motorcyclist walking towards my car. The distance from the motorcycle to the car could be about 15 feet. When he was walking towards me he looked very angry and aggressive and was waving the stick as he was walking. At that time he was not wearing his helmet. Then he came to the left hand side of the window of the car and gave a hard knock on the window with his left hand. I then brought the window screen down. He again started shouting and yelling abusive words. I tried to tell him again that the horn was not directed at him. He just refused to listen. He was again abusive using filthy language. He then got hold of the handle of the car door and opened it. With his left hand he caught hold of the collar of my shirt and dragged me out forcefully for about 4-5 feet towards Jalan Tempenis. When he dragged me out I resisted a little. But he was too strong for me. When he pulled me out he was angry, intimidating, shouting and threatening. He used foul language used earlier. I saw his face. He looked very angry like a mad man as if he was possessed by a demon. I was trying to calm him down by using my hands. I tried to explain to him. But it was of no use. He used the stick to poke against my chest. (Witness shown P11) The stick was very similar to this.

When he pulled me out I thought that he was serious and that he may cause me injury or kill me.

After poking me with the stick he moved the stick towards my face. I warded off the stick with my hand and it landed on my upper arm. When he was poking me with the stick I retreated. He poked again. I kept on retreating. I retreated as he was pushing and also because I thought he will further assault me. The impression that I got was that he was going to cause me grievous harm or even kill me. When he was doing that I told him that I had a gun. All the time he was waving the stick. He was always aiming at my face. When I told him I had a gun he said, 'Buatlah apa you suka.'

When he jabbed me it was hurting because it landed on the incision that I have for two by-pass operations. I was fearful that if he kept on assaulting me I might even die if the stick was to hit my head. He also mentioned, 'Kasilah mati-lu' when I showed him the gun. My purpose in showing him the gun was to frighten him so that he will stop assaulting me. He did not come to his senses when I showed him the gun. He became even more aggressive and angry. His behaviour was threatening, shouting and intimidating to kill me. He said, 'Kasilah, mati-lu' and 'Lu-mati' a number of times. At that time I genuinely believed that he was either going to cause me grievous hurt or even kill me. I feared for my life and felt that my life was in danger. I lifted my shirt and showed him the gun which was tucked at my waist near the belt.

When I showed him the gun he became more aggressive and swung the stick at me again. I raised my arm, and it landed on my upper arm again. He said, 'Lu-mati.' By that time my back was almost touching the rear door and bumper of my car. Then I was really frightened for my life. I took out my gun and fired a warning shot with my gun pointed at the sky. He did not retreat despite the warning shot. Instead he lunged the stick forcefully at my chest. It was at that stage that I genuinely feared that my life was in danger and that he was determined to kill me. He repeated, 'Kasi mati-lu.' He also kept on using vulgar words.

I fired the warning shot thinking that he might go away. He was not frightened at all.

Then various thoughts came to my mind at that time. He was definitely going to kill me. I must take some action to stop him from further assaulting me. I genuinely believed that he would kill me. It also came to my mind that he might dislodge the gun from my hand by hitting my hand and might use the gun to shoot me. I had this fear as he was taking another swing. At that stage I thought that I had to disarm him. So I brought my hand down and fired the second shot. It was directed towards his right hand so that he will drop the stick and stop assaulting me. I wanted to incapacitate or maim him. When the second shot was fired he was in the position of taking a swing at me.

After the second shot he was still standing there. I thought the second shot had also gone wide and did not hit the deceased. I then saw the deceased turned around and walked towards his motorcycle. He then fell on the ground. At the time of the second shot I genuinely believed in my mind that if I did not disarm him he would assault me and my life would be in danger. I wanted to save my own life. He was behaving really like a mad man as if he was possessed. He was shouting and yelling, intimidating and threatening to kill me. I fired the shot in good faith with no intention of killing him.

I started fearing for my life right from the time he pulled me out from the car. This fear constrained in my mind as he continued to assault me. He was not afraid when I first showed him the gun and fired in the air. All these did not deter the deceased from assaulting me. My fear continued till I fired the second shot. If he was not holding a stick I would not have shot. I never aimed and shot. I fired in the direction of his shoulder without aiming. Just before the second shot he was about 4-6 feet from me. The door of my car was ajar.

When he fell I walked up to him. It was then only I saw a gun shot wound on his right shoulder. By that time there were a few people. I told the people there to take him to the hospital and that I was going to the hospital in Malay. I called the deceased but there was no response. I then went back to the car and asked Ranjit Kaur to drive to the police station. (Witness shown P4) This is the person who was harassing me and whom I shot.

The accused then went to the Pantai Police Station. He arrived there at about 4.50pm. It took him about five to seven minutes to reach there. The accused then said:

I went straight to the officer at the inquiry. I told him that an Indian had assaulted me and that two shots were fired. I handed him the gun and the bullets. I told him the Indian was injured. I told him that I was injured in my arm and chest. He told me to wait till he had finished with the others. At that time I was feeling upset at what had happened. Then I asked for a white paper to draft out a report. I told my daughter-in-law to write what I dictated. While waiting I rang up my nephew, S S Muker and told him that an Indian had assaulted me and that I fired a shot in self-defence; that I am hurt in my arm and chest. I asked him to come to the police station. I could not write as I was more or less shivering. At that time I did not know he had died.

While drafting the report two police officers called me to the room. They were ACP Kamaruddin Desa and OCPD Koh Hong San. I told them what happened and showed them my injuries on the shoulder and chest. Kamaruddin asked me whether I had taken drinks. I said no. He said he would send me to the hospital and take my blood for examination. I told him that what I have told

him is what I had told him. I asked him to do his duty. After hearing my story he told me that he would take me to the hospital. He said that I have to give a statement and go back.

Eventually I made the report. S S Muker came to the police station after we had almost completed the report. The report was written by Ranjit Kaur and I had signed it. The I.O. Thomas Woon then met up with me after 6pm. He took off my shirt and took photographs. (Witness shown IDD41) These are the photographs. At about 10pm. I was taken to the University Hospital. The doctor examined my injuries and gave me an injection. Dr Myo Khine identified. I was then brought back to the Pantai Police Station. I was told to go to the Brickfields Police Station. There my statement was recorded under s. 112 of the CPC. (D43 shown to witness) This is the statement. It is signed by me. My evidence in court is similar to what I have stated there. When I gave the statement I was quite unstable. I inquired from Thomas Woon the condition of the deceased. He told me he had died. On hearing that I was completely shaken up. It took me about 10 minutes to recover. At that time I was still suffering from the pain. I told Thomas Woon. The statement was recorded from 2am to 2.30am to 3am. It took about an hour. After I gave the statement Thomas Woon told me that he had received instructions to allow me to go home and that he would call me if I am required.

At the junction of Jalan Maarof/Jalan Tempenis he kicked the car before coming to the window. At the scene I had no opportunity to turn anywhere to seek protection. The cars were not moving and I could not run anywhere. I had two open heart surgeries. In 1986 and 1992. I also have high blood pressure. I have severe diabetes. Now I am on insulin.

The person I called is S S Muker (identified).

At the junction he jabbed me with the stick. The thicker part of the stick came into contact with me. It was a dangerous stick. It was a big stick. If this stick were to land on my head it would kill me. The aggressive manner in which he was using it also frightened me. Even though I had a revolver with me I was still afraid because of the manner he assaulted me with this big stick. I used the gun as a last resort. I could not do anything else. He used the stick as a weapon of violence. I have never seen the deceased prior to this.

In his cross-examination the accused said that at the Balai Polis Pantai he dictated the report and DW5 wrote it. When exh. D43 was referred to him he said:

The time it was taken was at 0002 hours. It is not correct that it was recorded at 12.02 a.m. When the statement was recorded the facts were fresh in my mind but I was a bit confused.

As he said further in his cross-examination:

When the deceased shouted using vulgar words I did not take it seriously. When Ranjit Kaur explained to him first I took over and explained. The deceased never listened to us. He then disappeared. I thought he had gone. At one stage I told him let us go to the police station. This was at the junction of Jalan Travers and Brickfields. Here I am not sure whether he hit the car. He abused me again using the same words. He challenged me to a fight. I told him if he wanted to fight let us go to the police station. The use of the term 'Bengali' is normal.

Q: You did not mention the use of abusive words at this junction.

A: I do not know.

At that time there was a jam at Jalan Maarof always. The distance from the Jalan Tempenis junction to the traffic lights near the mosque is about 100 yards. Earlier there was a jam bumper to bumper. When I was near the petrol station I was at the inner lane. Both lanes were jammed. There was no jam at Jalan Tempenis.

He parked his motorcycle at the other side and was coming towards me with the stick. My car was at position Y. If I had wanted to go to Jalan Tempenis I could have gone. I went straight to avoid him.

I saw him coming towards me with a stick. I was in the car.

Q: If you thought he was going to attack you what was your reaction?

A: At that time I did not think he would assault me.

Q: Could you have locked the door?

A: I could have.

(Witness referred to P4 C and D)

The motorcycle nearer to the deceased is his. In that position the motorcycle would cause obstruction to other road users. I resisted when he dragged me out of the car. He was holding on to my collar. I held on to the seat. Despite that he dragged me out. I did not have my safety belt on at that time. He pulled me out by holding my collar. In the course of resisting I did not knock against the car.

I warded off the stick with my hand. (Witness demonstrates) The stick did not touch my face at any time. The deceased told me many times 'Kasi matilu'.

Q: You did not mention this in your s. 112 statement or police statement?

A: No.

Q: Before the first shot he could have hit you if he wanted to?

A: He hit me twice.

Q: After that did he hit you?

A: He attempted to do so. At that time the traffic was jammed. Before the first shot there was nobody else on the road. When these things were happening Ranjit Kaur was seated in the car. I had a handphone on that day. The duration of time from the time I was pulled out till the firing of the first shot was a few seconds. The deceased was swinging the stick towards me.

After the first shot when the deceased was waving the stick at me he was about 4-6 feet away. After the first shot he was jabbing me. When I discharged the second shot the deceased was standing in front of me slightly to the left. I was nearer the rear door and the rear mudguard. Just before the second shot he was shouting at me. I cannot recollect the words. I kept on telling him to stop it. I kept telling him 'Ini bukan lu punya pasal.' At that stage I was quite calm. I was upset but not angry. After the second shot I went to see him. I was very upset at what had happened. There were people then. I was at the place where the deceased was lying for a few seconds. I went into my car and went to the police station. I told the people there to take him to the hospital. There were too many Indians there and I was afraid. The duration of time between the first shot and second shot was 10-12 seconds.

I deny that I did not tell the police at the first instance that I suffered injuries. I deny that there were no other people at the counter of the Balai when I went there. Somebody took IDD41. May be on the instructions of Thomas Woon. ACP Kamaruddin did not send me to the hospital. I reached the hospital at 10.30 p.m. to 11.00 p.m. We had to wait for quite some time before the doctor came. We had to wait for about half an hour. I deny that I was in fear of my life and that was why I fired the second shot is not true. I deny that I was in no fear of danger when I fired the second shot. What the prosecution witnesses said is not true as their attention would have been drawn only after the first shot. The stick is a dangerous weapon. I only used the gun as a last resort. When I fired the shot he was in the course of taking another swing at the hand. So I fired in that direction. I deny that whatever I have said is a fabrication. When I fired the shot I only wanted to incapacitate the deceased and not to to kill him.

In his re-examination the accused said that it took only a few seconds from the time he was dragged out of the car till he fired the first shot. He said that the deceased kept coming towards him and he was not the aggressor at any point of time.

DW4 is a second-hand car salesman attached to the NZ Wawasan Sdn Bhd. On 7 June 2002 at about 4pm he was driving a Mitsubishi Lancer motor car bearing registration number CS 3028 with a passenger named Yusof from the direction of Jalan Kuching towards Bangsar. He stopped in front of the Railway Station as there was a traffic congestion there. He then said:

> Apabila kereta mula bergerak saya ternampak seorang India menunggang motosikal jenis Honda EX5. Lelaki tersebut sedang memarahi dan memaki hamun terhadap sebuah kereta Mercedes berwarna keemasan. Masa itu penunggang motosikal dan kereta Mercedes berada di lorong sebelah kanan menghala ke Bangsar. Ini di selepas traffic light di hadapan Mahkamah Syariah. Penunggang motosikal berada di sebelah kiri kereta Mercedes. Saya tak dapat dengar maki hamun kerana dia angkat tangan ke arah kereta Mercedes. Mulut penunggang motosikal tidak berhenti mengkumat-kamit. Kemudian saya nampak penunggang motosikal cuba menanggalkan topi keledarnya. Dia mengayunkan topi keledarnya ke arah kereta Merdedes itu. Dia guna tangan kanan. Dia masih di sebelah kiri kereta dan dua kenderaan sedang jalan. Penunggang motosikal melakukan perkara yang sama beberapa kali. Saya tak pasti sama ada kena kereta. Saya nampak dia menendang bahagian tengah kereta Mercedes sebelah kiri. Dia gunakan kakinya sebelah kanan. Reaksinya seperti dalam keadaan marah dan mulutnya tidak berhenti seperti berkata sesuatu. Seterusnya saya nampak selepas flyover di hadapan Muzium Negara penunggang motosikal itu sekali lagi mengayunkan topi keledarnya ke arah Mercedes tersebut. Dia cuba menendang sekali lagi pada kereta Mercedes tersebut. Seterusnya apabila sampai di persimpangan Jalan Travers dan Brickfields kereta Mercedes berhenti di sebabkan traffic light merah di hadapan lebihkurang belakang 5 kereta dari traffic light. Di lorong yang paling kanan. Kereta saya berada lebihkurang 2 – 3 biji kereta dari kereta Mercedes di lorong yang sama. Di sini saya nampak penunggang motosikal menghampiri pintu hadapan kiri kereta Mercedes. Saya nampak penunggang motosikal seperti berkata sesuatu dalam keadaan marah. Apabila kereta mula bergerak penunggang motosikal itu tidak kelihatan lagi.

DW4 then saw the Mercedes car proceeding towards Jalan Maarof. The car stopped at the junction of Jalan Maarof and Jalan Tempenis on the extreme right lane to turn to the right. The Mercedes car was directly in front of his car at that time. As he said:

Di situ saya dapat melihat dengan jelas no Mercedes iaitu WD5. Saya lihat ada 2 orang dalam kereta Mercedes itu. Pemandu adalah seorang perempuan dan penumpang seorang lelaki. Apabila kereta mula bergerak saya nampak semula penunggang motosikal tadi sedang menunggu di bahagian kiri jalan pada selekoh untuk belok ke kanan. Dia kelihatan seperti menunggu kehadiran kereta Mercedes itu. Apabila kereta Mercedes menghampiri penunggang motosikal itu dia mengekori kereta Mercedes itu di sebelah kiri. Dia kelihatan marah kepada kereta tersebut dengan mulutnya yang tidak berhenti berkata-kata ke arah kereta Mercedes. Kemarahan nampaknya lebih meningkat. Pada masa itu kereta Mercedes berjalan perlahan-lahan kerana berlaku kesesakan di kedua-dua lorong untuk memasuki ke Jalan Maarof. Kesesakan berlaku sebelah Stesen Minyak Petronas lebihkurang 10 meter dari petrol station. Pada masa itu penunggang motosikal tidak kelihatan. Pada masa itu saya masih betul-betul di belakang kereta Mercedes. Saya ambil lorong yang di paling kiri.

Apabila kereta saya berada di antara persimpangan Jalan Maarof dan Jalan Tempenis kereta Mercedes itu berhenti. Saya pun terpaksa berhenti. Mungkin di sebabkan traffic light di hadapan. Pada ketika itu saya nampak penunggang motosikal tadi sedang mematahkan dahan-dahan pokok dari longgokan dahan-dahan pokok yang ada di sebelah kiri Jalan Tempenis. Dia telah meletakkan motosikalnya di tepi jalan berhampiran dengan longgokan kayu. Dia turun dari motosikal untuk ambil kayu itu. Kemudian dia menaiki motosikal semula dengan memegang kayu itu di tangan kirinya. Dia memusingkan motosikalnya menuju ke arah persimpangan Jalan Maarof dan Jalan Tempenis. Dia buat macam U-turn. Dia letakkan motosikalnya berhampiran dengan papan tanda berhenti. Dia menanggalkan topi keledarnya. Dia masih di atas motosikalnya. Dia letak topi keledar di atas motosikal. Seterusnya dia berjalan menuju ke pintu sebelah kiri kereta Mercedes. Pada ketika itu saya nampak seorang lelaki tua keluar dari kereta itu. Penunggang motosikal ada berhampiran pintu Mercedes sebelah penumpang depan. Orang itu keluar seperti dia didesak. Maksud saya dia keluar dengan cara yang tidak bersedia untuk keluar. Saya rasa dia seperti ditarik. Dari pemandangan saya masa itu tidak begitu jelas. Kemudian berlaku pertengkaran di antara lelaki tua itu dengan penunggang motosikal tadi. Penunggang motosikal itu kelihatan sangat marah. Mukanya sangat bengis. Saya boleh nampak mukanya tetapi dari sebelah tepi sahaja. Penunggang motosikal itu cuba mengayun kayu yang dipegangnya. Positionnya seperti mahu pukul ke arah orang tua itu. Ia berlaku beberapa kali. Saya nampak penunggang motosikal menjolokkan kayu itu ke arah dada orang tua itu. Orang tua itu kelihatan berundur ke belakang ke arah keretanya. Saya rasa cemas pada masa itu. Sebab saya takut mungkin penunggang motosikal itu akan mengapa-apakan orang tua itu. Kemudian saya lihat orang tua itu dalam keadaan takut dan cemas. Dia cuba menenangkan penunggang motosikal itu. Dia menunjuk tangannya dan bercakap. Saya tak dapat dengar.

> Kemudian saya terdengar satu das tembakan. Saya nampak orang tua itu tembak ke arah atas. Seterusnya penunggang motosikal itu tidak berganjak dari situ. Dia kelihatan sangat marah. Dia ada juga menjerit dengan kata, 'Tembaklah, Tembaklah.' Saya boleh dengar kerana dia menjerit. Tingkap kereta buka separuh di sebelah kiri. Lepas beberapa ketika saya terdengar satu lagi das tembakan di lepaskan oleh orang tua itu. Masa di antara tembakan pertama dan kedua 6-7 saat. Sebelum tembakan kedua dilepaskan oleh orang tua itu penunggang motosikal itu mengayunkan kayu yang dipegangnya dalam posisi hendak pukul orang tua itu. Ini berlaku satu saat sahaja. Kemudian saya lihat penunggang motosikal itu berjalan ke arah motosikalnya dan dia rebah dekat dengan motosikalnya. Terusnya orang tua itu terpinga-pinga. Dengan cara dia memandang kiri dan kanan.

In narrating the circumstances in which what he had witnessed was communicated to the accused he said:

> Saya sebenarnya terbaca surat khabar Utusan yang muka hadapanya menceritakan tentang kes Dato Balwant di tuduh membunuh. Jadi saya rasa Dato' Balwant tidak bersalah kerana dia membunuh bukannya dengan niatnya dari apa yang saya lihat. Saya telah menceritakan perkara ini kepada kakak saya bernama Norzilah binti Ismail bagaimana perkara ini berlaku dan dia bersependapat dengan saya. Kakak saya telah hubungi pihak Dato' Balwant melalui telefon. Saya tak pasti macam mana dia tahu no telefon Dato' Balwant. Semasa dia telefon saya tidak ada. Dia berkerja satu syarikat dengan syarikat saya. Saya tak ingat bulan apa saya beritahu kakak saya tetapi dalam tahun 2002. Beberapa hari selepas kakak saya hubungi Dato Balwant saya dihubungi di tempat kerja saya oleh Dato' Shafee, En Nimal dan En Rabinder Singh. Saya dan kakak saya tak pernah jumpa dengan Dato Balwant. Sebelum ini saya dan kakak saya tak kenal dengan Dato' Balwant. Selepas saya ditemuduga oleh peguam saya tidak ditemuduga oleh peguam lain. En Yusof dalam kereta saya adalah pelanggan saya. Saya kenali dia hanya pada hari itu. Saya tak kenal nama penuhnya. En Yusof hendak ke Brickfields. Saya hendak pergi ke Bangsar. Kita ke bank dahulu di Bangsar.

In his cross-examination DW4 said that Syarikat NZ belongs to his brother-in-law and that his sister (DW6) works with him. In testifying on his meetings with defence counsel he said:

> Saya tahu tentang kejadian ini selepas saya baca akhbar dan OKT dituduh di Mahkamah. Peguam jumpa saya beberapa hari selepas keluar akhbar. Saya jumpa Dato' Shafee beberapa kali. Saya ditemuduga oleh Dato Shafee. Lepas itu statement saya diambil oleh pihak polis. Saya tidak laporkan kepada polis pada masa kejadian sebab saya rasa kes ini dapat diselesaikan dengan bahawasanya Dato' Balwant tidak disabitkan dengan kesalahan. Saya belum cukup bersedia untuk memberitahu pihak polis. Maksud saya ialah untuk mengingati semula peristiwa. Sekurang-kurangnya saya bersedia untuk memberi

keterangan kepada peguam. Saya bersedia apabila saya berjumpa dengan peguam. Selepas itu saya pun bersedia untuk memberi statement kepada polis. Saya rasa statement yang saya beri kepada polis adalah sama dengan keterangan yang saya beri kepada peguam. Sebelum perbicaraan peguam ada berjumpa dengan saya. Tujuannya ialah supaya saya lebih bersedia. Maksud saya ialah kemungkinan saya gugup di Mahkamah. Peguam ada mencerita kepada saya berulang kali.

He was then cross-examined on what transpired from the Railway Station onwards. He disagreed that this part of his evidence is fabricated. In answer to questions as to what happened at the scene of the incident he said:

Apabila lampu isyarat tukar ke warna hijau dan kereta mula bergerak saya nampak penunggang motosikal itu disebelah kiri selekoh untuk masuk ke Jalan Maarof. Penunggang motosikal itu seperti sedang menunggu kereta Mercedes itu. Dia menoleh ke belakang. Kemudian kereta Mercedes bergerak. Penunggang motosikal itu mengekori kereta itu. Dalam keadaan marah sebab dia mengayun tangannya dan mulutnya tak berhenti berkata-kata ke arah Mercedes. Pada masa itu saya di sebelah kanan. Motosikal di sebelah kiri belakang motosikal. Visor helmet itu tidak terlalu gelap. Saya tak dengar apa dia cakap. Di situ berlaku kesesakan jalan. Kereta bergerak perlahan.

Kemudian penunggang motosikal itu tidak kelihatan. Apabila sampai di persimpangan Jalan Tempenis/Jalan Maarof kereta Mercedes dan kereta saya telah berhenti. Saya ada sama lorong dengan kereta Mercedes itu. Saya ternampak penunggang motosikal tadi sedang mematahkan dahan pokok di Jalan Tempenis sebelah kiri dari longgokan dahan-dahan pokok yang telah dipotong. Kemudian saya nampak penunggang motosikal menunggang motosikal dan pusing balik ke arah Jalan Maarof dan berhenti di sebelah kanan Jalan Tempenis. Saya nampak dia menanggalkan topi keledarnya lalu berjalan menghampiri kereta Mercedes tersebut dengan memegang sebatang kayu di tangannya. Kemudian penunggang motosikal berada rapat dengan kereta Mercedes tersebut di sebelah kiri. Seterusnya saya nampak seorang tua keluar dari kereta Mercedes itu. Kemudian berlaku pertengkaran di situ di antara penunggang motosikal dengan orang tua. Penunggang motosikal itu dalam keadaan sangat marah. Dia mengangkat atau mengayunkan kayu yang dipegangnya dalam posisi hendak mahu memukul. Kemudian saya nampak orang tua itu seperti cuba menenangkan penunggang motosikal tersebut. Penunggang motosikal itu dalam keadaan sangat marah. Selepas itu saya dengar satu tembakan dari orang tua itu. Dia telah menembak ke arah atas. Saya fikir dia berbuat demikian untuk memberi amaran kepada penunggang motosikal itu. Kemudian penunggang motosikal itu tidak bergerak dari tempatnya dan berkeadaan lebih marah serta bengis. Saya ada dengar dia menjerit dengan berkata, 'Tembaklah, tembaklah.' Selepas orang tua itu keluar dari kereta berlaku pertengkaran. Saya ada nampak penunggang motosikal menjolokkan kayu yang dipegangnya ke arah badan orang tua itu.

Selepas beberapa ketika itu saya nampak penunggang motosikal cuba mengayunkan kayu yang dipegangnya seperti posisi yang hendak memukul. Selepas itu saya dengar satu lagi das tembakan. Penunggang motosikal itu berkeadaan lemah menuju ke arah motosikalnya dan dia rebah berhampiran motosikalnya. Pada ketika itu saya nampak orang tua dalam keadaan terpinga-pinga.

In the concluding part of his cross-examination he said:

Saya tidak setuju bahawa saya datang ke Mahkamah untuk memberi keterangan yang tidak benar. Saya tak setuju selepas tembakan pertama simati pergi untuk mengambil kayu. Saya langsung tak setuju bahawa selepas itulah simati ditembak apabila dia berada 10 kaki jauh dari OKT dan kayu pada masa itu berada di bawah. Saya kata saya tak pasti sama ada kayu mencecah badan OKT. Pada masa itu simati tidak pakai helmet.

In his re-examination DW4 said:

Saya tahu tentang kejadian selepas kejadian OKT dituduh di Mahkamah. Selepas saya tahu OKT dituduh kakak saya yang menggalakkan saya menjadi saksi. Saya membaca balik surat akuan kenyataan saya dengan peguam supaya saya tidak gugup di Mahkamah. Itu sahaja. Surat akuan dibuat di hadapan Pesuruhjaya Sumpah dan seorang peguam. Peguam itu bukan dari firma Dato Shafee.

Selepas kejadian pada hari itu saya masih sempat berurusan di Arab Malaysian Finance. Saya sampai sana di counters 4.30-5.00 petang. Pejabat dalam buka. Bank di luar tutup. Saya boleh masuk. Ini kali pertama saya lihat kejadian macam ini. Saya ada menunggang motosikal lama. Motosikal EX5 ada gear 5 dan 4. Kalau accelerator ditinggalkan motosikal masih lagi berjalan. Saya tahu ada accelerator yang tidak lari balik.

Orang tua keluar dari kereta. Dia keluar seperti keadaan yang terdesak dan tak kemas. Macam ditarik keluar. Sebab kedudukan motosikal rapat dengan kereta Mercedes di sebelah pintu depan. Cara OKT keluar seolah-olah dia didesak. Apa yang saya nampak saya cerita di Mahkamah. Saya tidak lihat kejadian dari Mahkamah Syariah secara berterusan. (Kakak saksi Norsilah binti Ismail – dicamkan)

DW5 said that on 7 June 2002 she was driving Mercedes car bearing registration number WD5 along Jalan Raja towards the Railway Station. The accused was in the car. When they were in front of the Railway Station the deceased who was riding a motorcycle overtook them on the left. Then a motor car came into her lane. She hooted. The car went back to its lane. When she stopped at the traffic light the deceased came towards her on his motorcycle against the flow of traffic. He was angry and abusive. He uttered the words,

"Bengali busuk, Bengali bitch, Bengali pukima" at her. When the traffic turned green he sped off and was waiting at the bus stop at the Sulaiman Building. He signalled to her to pull up to the left. She did not stop. She then said:

> As I was driving slowly he was on my left at the back. I could see from the rear view mirror he was not wearing the helmet. I heard some knocking sounds. Not too loud. He did that for a while. I kept moving slowly. As we were nearing the Museum he knocked the car and sped off. Then he was out of sight again. I thought he had gone and was relieved.

DW5 said that she stopped at the Jalan Travers/Jalan Brickfields junction as the traffic light was showing red. As she said:

> I was about 7 cars away. The motorcyclist came back again. He made a U-turn at the back of the car and came to the passenger side of the car. He knocked hard at the window with his hand. The accused put the window down and said that the horn was not meant for him. He said, 'Mari turun lawan. Mari turun lawan.' The accused said, 'I tak mahu lawan. Kalau mahu lawan mari ke polis station.' At the mention of the word police he got more angry. He was abusive. The light turned green. He sped away. He was out of sight.

DW5 then stopped at the junction of Jalan Bangsar/Jalan Maarof as the traffic light was red. As she said:

> We were on the left lane. There I saw the motorcyclist waiting on the left side of the road. He had not crossed the road yet. He was almost in front of me. The light was red. He was abusing and asked accused to put the window down. The accused did not. He was very angry. When the light turned green he was in front of me. So I could not move till someone hooted from the back. Then he moved.

When DW5 was driving along Jalan Maarof on the left the deceased was in front. He looked angry and was looking back at their car. At the Petronas Petrol Station she signalled to turn into Jalan Tempenis. The deceased then turned into Jalan Tempenis before them. The accused told her to put off the indicator and go straight to prevent the deceased from following them to their house. In relating what transpired at the scene of the incident she said:

> I saw him picking up a stick from the left side of Jalan Tempenis. My car was half way on the Jalan Tempenis junction. I had to stop as the traffic had stopped. He picked the stick, made a U-turn there and went to the right side of Jalan Tempenis. He had the stick. He came back to the junction. He got down from the motorcycle. He took his helmet off and left it on the motorcycle. With the stick in his right hand he came towards my car. He looked angry. He came to the accused's side. He kicked the tyre. He came to

the left window and knocked hard with the hand. Dato put the window down. Again he said, 'You bloody Bengali. Mari turun lawan.' Dato said, 'Saya tak mahu lawan. Mahu lawan pergi polis station.' It was at this stage he became angry and violent. He opened the door suddenly and dragged him out of the car. He pulled him about 4 feet away from the car up Jalan Tempenis. I saw him swung the stick and was trying to hit Dato's hand or face. Dato tried to ward off the blow but it landed on the upper left arm. I did not do anything. I next saw him jabbing Dato's chest with the stick. I could see Dato retreating as he was being jabbed. Dato tried to tell him something to calm him down. He kept on jabbing him. Dato kept retreating till he came closer to the car. I saw the deceased very violent and Dato was shaken up. He was against the car. He could not move anymore. I saw Dato lifted his shirt. I assume he was showing the gun. When he lifted the shirt he came more aggressive and jabbed again. I could hear the words, 'Tembaklah, tembaklah.' He was jabbing Dato harder. I saw Dato pull the gun and heard a shot. Next he became more violent and aggressive. He did not retreat. Dato was saying something and was begging him not to hit him. It was a faint voice. The deceased kept on jabbing Dato and heard another shot.

When I heard the second shot the deceased was 4-5 feet from the accused. Just before the second shot the deceased was about to swing the stick at accused. When all this was happening I was frightened. I thought I was going to lose my dad. The deceased was behaving like a mad man.

The deceased stood for a while. Reaching his motorcycle he fell. (Witness referred to P4) This is where he fell. P4 C and D shows the motorcycle nearest to him. That was where he parked it.

I then drove the accused to the Pantai Police Station where he lodged a report. (P11 shown to witness) This is the kind of stick the deceased was using. The accused was shivering and was in a state of shock. I have never seen him in that condition before. He showed me the upper left arm and said it was painful. He complained of pain on the chest.

In her cross-examination DW5 said that the deceased had confronted them from the Railway Station to Jalan Tempenis at least four times. As she said:

We managed to avoid him. At Jalan Travers/Brickfields junction he said, 'Mari lawan.' The accused said, 'Kalau mahu lawan pergi ke polis station.' This was the 3rd time he confronted us. We did not go to the police station. The 4th time was when we were at the Jalan Maarof junction. We ignored him and proceeded. The traffic along Jalan Maarof was moving but very slow. There is a traffic light at the mosque. The jam was caused by the traffc light.

DW5 said that she saw the deceased going into Jalan Tempenis and coming back. She could not turn into Jalan Tempenis to avoid him as she had passed the junction and the traffic was heavy. On being questioned on the events that led to the shooting she said:

> I knew that the accused had a gun. I did not give the accused any assistance. The accused was standing outside the car. I could see his whole body. He was dragged about 5 feet away from the car. I could see him from his waist upwards. From below it was blocked by the car. The accused lifted the shirt and I heard the shot. When he fired the first shot there was nobody else there. Only the cars. The time between the first shot and the second shot was about 10 seconds. Just before the second shot the deceased was on the left of the car at an angle. The accused was against the car on the left-hand side. They were almost facing each other. After the first shot and before the second shot the deceased was very aggressive and angry. The accused was pleading with him not to hurt him. The accused was not facing me at that time. At this point of time my car was holding up the traffic. I do not remember whether there was a car in front of me. When we reached the junction the traffic was not moving. Before reaching that place the traffic was moving slowly.
>
> The stick was on the chest of the accused. He could not have got back into the car. It all happened very fast. I was scared I would lose accused. I was too frightened to do anything.
>
> After the first shot I did not really notice whether there were people there. I deny that I did not assist accused as he was in a better position with a gun. I deny that accused came out of the car by himself holding the gun. I deny that he purposely came out of the car to confront the deceased. I did not see the firing of the second shot. The accused went to the place where the deceased was lying. After that we went to Balai Polis Pantai. I carry the handphone of the accused. I did not make any calls to the police. I did not call for the amblance. I deny that after the first shot the deceased ran to the other side of the road and came back with the stick. I deny that the deceased did that to protect himself.

She then continued:

> I was worried about the chest pain of accused as he is a heart patient. He instructed me to go to the police station. Just before the second shot I saw deceased swinging the stick. I did not see it touching accused. The left front door of the car was open. The deceased was standing against the back door of the car. The deceased was in front of the car at an angle. I deny that distance between accused and deceased at that time was about 10 feet. I deny that deceased was swinging the stick up and down. I deny that when his hand was down the second shot was fired.

In her re-examination DW5 said that from the time the accused was pulled out till the firing of the second shot he was within striking distance by the deceased.

DW6 said that in the late afternoon of 7 June 2002 her husband instructed DW5, her younger brother, to send some documents to Arab Finance at Bangsar. He left at about 4pm with Yusof. She then said:

> DW5 pulang ke pejabat lebihkurang 6.00. Dia menceritakan tentang kejadian yang dia lihat berlakunya tembakan di Bangsar.
>
> Sebulan atau dua selepas itu saya ada terbaca di surat khabar tentang seorang Dato Balwant Singh. Dato Balwant didakwa membunuh dalam kes tembak di Bangsar yang mana DW5 ada cerita pada saya. Kalau berpandu pada cerita adik saya saya rasa Dato Balwant tidak bersalah. Jadi saya nasihatkan adik saya untuk memberi keterangan yang benar mengenai kejadian itu. Pada mulanya adik saya takut untuk menjadi saksi. Atas nasihat saya saya hendak dia menunjukkan keadilan dalam kes Dato Balwant. Lepas itu dia bersetuju menjadi saksi. Saya cuba mencari no telefon Dato Balwant sendiri melalui buku panduan telefon. Saya sekali dial dan saya dapat pejabatnya. Mula-mula telefon saya dijawab oleh seorang perempuan. Kemudiannya disambungkan kepada seorang lelaki. Saya tidak tahu nama kedua-dua orang itu. Saya beritahu kepada lelaki itu bahawa adik saya boleh menjadi saksi kerana dia melihat kejadian itu. Saya ada memberi nombor telefon office saya.
>
> Beberapa hari kemudian saya dihubungi oleh Dato Shafee sendiri dan En Rabinder Singh. Saya tak ingat nama seorang lain. Mereka datang ke pejabat saya untuk mendapat keterangan dari adik saya sendiri. Selepas itu saya serahkan perkara itu kepada peguam dan adik saya. Saya atau adik saya tak buat laporan polis. Saya tahu beberapa bulan kemudian polis ada ambil statement dari adik saya. Saya pergi bersama-sama dengan adik saya. ASP Thomas Woon yang ambil statement.

In her cross-examination DW6 said that DW4 told her of the incident after he returned to the office. As she further said:

> Saya setuju saya tidak tahu apa yang diceritakan oleh adik saya benar atau tidak sebab saya tidak ada di tempat kejadian. Apa yang diceritakan oleh adik saya adalah lebih kasihan kepada OKT. Oleh sebab itu saya rasa simpati kepada OKT. Saya tidak telefon polis kerana Dato Balwant telah didakwa. Saya tidak tahu jika Dato Balwant telah didakwa saya masih boleh memberitahu polis. Saya tidak tahu prosedur itu. Ini adalah kali pertama pengalaman saya. I took the initiative untuk memberitahu Dato Balwant.
>
> Peguam datang ke pejabat saya. Selepas itu saya dipanggil oleh ASP Thomas. Memang benar adik saya tidak mahu datang ke Mahkamah untuk memberi keterangan bagi pihak pembela. Saya yang menyuruhnya datang ke Mahkamah.

Saya tak kenal OKT. Saya beria-ia menyuruh adik saya datang sebab saya kasihan kepada OKT. Kalau ikut cerita tertuduh tidak salah. Saya tidak kenal simati.

Dalam urusan saya saya ada buat agreement. Saya tiada urusan dengan firma peguam. Hanya dengan bank.

Tujuan saya tampil ke hadapan bukan untuk mengharap sesuatu.

In her re-examination she said:

Saya percaya dengan cerita adik saya sebab saya percaya adik saya. Bila dia balik dia nampak tidak biasa. Dalam keadaan terkejut. Saya nasihatinya datang ke Mahkamah. Saya tidak paksa dia.

DW2 said that he received a telephone call from the accused at about 4.45pm to 4.50pm. As he said:

Over the phone he told that he had been assaulted by a male Indian and was injured on his left upper arm and chest. He then informed me that he had no alternative but to shoot the assailant. He said that he was at the Pantai Police Station. He asked me to go there. He informed me that the Indian man assaulted him with a stick.

I arrived at the Pantai Police Station at about 6.15pm. When I arrived at the police station I saw Dato Balwant and Ranjit Kaur at the Inquiry Office of the police station. Dato Balwant informed me that he had lodged a police report. He showed me the injuries on the left upper arm and the chest. When I first saw him he appeared to be flustered and concerned. He appeared worried and was almost in a state of shock. He then explained to me what had occurred that evening. He said that he was on his way home. (DPP objects as this is hearsay) D/C says he has no further questions.

In his cross-examination he said that what he had told the court is what DW1 had told him.

DW3, a doctor attached to the University Hospital, examined the accused at about 11pm on 7 June 2002. As he said:

He told me he was assaulted by a man with a wooden stick. He said that the man poked him on his chest and hit him on the left arm. I examined the patient. On his left arm I found redness on the outer side of the arm. It is approximately 5 cm in diameter. It did not have a distinct margin. (P11 shown to witness) The injury could have been caused by any blunt object. It is also consistent with having been caused by this stick. He had an abrasion wound on his chest. (P41 shown to witness) It was at the centre of the chest over the sternum and over a scar. It was a by-pass scar. The abrasion was a breach of the skin. It could have been caused by a blunt object. It was 1 cm in diameter. (Witness shows the abrasion in P41) It could have been caused by being poked with P11.

In his cross-examination he said that the accused had redness on the arm which is not consistent with two hard blows. In his re-examination he said:

> The two injuries were consistent with the complaint made by the accused. I do not know the amount of force used on accused. If the two blows landed on the same spot then the injuries found will be consistent with the two blows. If the arm is moving the injury will not conform to the shape of the stick. If the arm is not moving it will take the full blow. If the arm is moving it may not take the full blow. Not all serious injuries will have an open wound.
>
> In the course of my duties I have seen many assault cases. The accused's injuries are consistent with an assault case. The accused was disturbed and very anxious.

The defence then closed its case. Both parties made their submissions. As the submission of the prosecution focussed principally on the credibility of some of the defence witnesses I consider it necessary to highlight the law relating to the manner of assessing the veracity of a witness. As I said in *PP v. Dato' Seri Anwar bin Ibrahim (No 3)* [1999] 2 CLJ 215 the Privy Council has stated that the real tests for either accepting or rejecting the evidence of a witness are how consistent the story is with itself, how it stands the test of cross-examination, and how far it fits in with the rest of the evidence and the circumstances of the case (see *Bhojraj v. Sitaram* AIR [1936] PC 60). It must, however, be observed that being unshaken in cross-examination is not per se an all-sufficient acid test of credibility. The inherent probability or improbability of a fact in issue must be the prime consideration (see *Muniandy & Ors v. PP* [1966] 1 MLJ 257). It has been held that if a witness demonstrably tells lies, his evidence must be looked upon with suspicion and treated with caution, but to say that it should be entirely rejected would be to go too far (see *Khoon Chye Hin v. PP* [1961] MLJ 105). It has also been held that discrepancies and contradictions there will always be in a case. In considering them, what the court has to decide is whether they are of such a nature as to discredit the witness entirely and render the whole of his evidence worthless and untrustworthy (see *De Silva v. PP* [1964] MLJ 81). The Indian Supreme Court has pointed out that one hardly comes across a witness whose evidence does not contain a grain of untruth or at any rate exaggerations, embroideries or embellishments (see *Ugar v. State of Bihar* AIR [1965] SC 277). It is useful to refer to *PP v. Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where Raja Azlan Shah FJ (as His Highness then was) said at p 19:

> … In my opinion, discrepancies there will always be, because in the circumstances in which the events happened, every witness does not remember the same thing and he does not remember accurately every single thing that happened. … The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other.

In the absence of any contradiction, however, and in the absence of any element of inherent improbability, the evidence of any witness, whether a police witness or not, who gives evidence on affirmation, should normally be accepted (see *PP v. Mohamed Ali* [1962] MLJ 257).

As the prosecution submission was mainly centred on the credibility of the accused and DW5 I shall now consider the main aspects of their submission and other significant features later.

(i) The Accused

The Effect Of Exhibit D43

The defence tendered exh. D43 for the purpose of corroborating the testimony of the accused through PW12 in the course of the case for the prosecution. It is his statement to the police. It reveals that it does not in fact corroborate but instead certain parts of it contradict the evidence of DW1. The relevant part of it reads as follows:

> Lepas tembakan dilepaskan, lelaki itu lagi tolak saya dengan kuat dengan kayu itu dan tangan saya pun turun dan saya percaya saya telah tertekan picu senjatapi yang menyebabkan satu das tembakan dilepaskan. Masa itu saya masih ingat bahawa tembakan kedua juga dilepaskan ke arah langit kerana saya tidak nampak lelaki itu dan beraksi macam kena tembak dan dia telah berjalan balik ke motosikalnya.

The prosecution made an issue of the contradictory part and said that it shows that the accused is not a truthful and credible witness and therefore his evidence should not be relied upon. It was argued that since the accused has admitted making the statement there was no necessity to comply further with s. 145 ("s. 145") of the Evidence Act 1950 ("the Act") to explain the contradiction. In support the prosecution referred to *Bhagwan Singh v. The State of Punjab* [1952] SCR 812 where Bose J said at pp 819-820:

> Resort to section 145 would only be necessary if the witness denies that he made the former statement. In that event, it would be necessary to prove that he did, and if the former statement was reduced to writing, then section 145 requires that his attention must be drawn to those parts which are to be used for contradiction. But that position does not arise when the witness admits the former statement. In such a case all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made.

It was also argued that exh. D43 amounts to an admission under s. 17 of the Act and thereby amounts to substantive evidence. In support reference was made to *Bharat Singh v. Bhagirathi* AIR [1966] SC 405 where it was held that where the previous inconsistent statement amounts to an admission duly proved it can be used without being put to the witness for an explanation. The prosecution further argued that the fact that the accused had admitted making exh. D43 makes it evidence against him. In support reference was made to *R v. Gillespie* [1967] 51 Cr App R 172 where Winn LJ said at p. 177:

> As it seems to this Court, if a document is produced to a witness and the witness is asked: 'Do you see what that document purports to record?' the witness may say: 'I see it, I accept it as true,' in which case the contents of the document became evidence against him: or he may say: 'I see what is there written, I do not accept that as true,' whereupon that which is purported to be recorded in the document is not evidence against that person who has rejected the contents; it becomes what one might call non-evidence, the document itself being nothing but hearsay.

A preliminary matter that must be resolved is whether exh. D43 is admissible. In order to decide the question whether certain evidence is admissible, it is necessary to look to the object for which it is produced and the point it is intended to establish for it may be admissible for one purpose and not for another (see *Taylor v. Williams* 3 B & Ad 845). Exhibit D43 was tendered to corroborate the evidence of the accused and it must therefore satisfy the requirements of s. 157 of the Act ("s. 157") which reads as follows:

> In order to corroborate the testimony of a witness, any former statement made by him whether written or verbal, on oath, or in ordinary conversation, relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, may be proved.

In considering the admissibility of a former statement under s. 157 it is significant to realise the stage of the trial at which it should be tendered and the manner of adducing it in evidence. In dealing with the proper stage at which evidence in corroboration can be admitted under s. 157 *Sarkar on Evidence* 15th edn, vol 2 says at p. 2282:

> It is doubtful whether s. 136 gives the court discretion to allow evidence to corroborate witnesses to be given under s. 157 before the witness himself is examined. But, in any case, such evidence can be admitted only very rarely and for special reasons to be recorded by the judge (*Ml Myin v. R*, 5 LBR 4:9 Cri LJ 576). Although ordinarily, before corroborative evidence is admissible the evidence sought to be corroborated must have been given, yet the court has no doubt a discretion to allow evidence under s. 157 to be given out of order. Such discretion should be rarely used. The course is not only inconvenient but likely to cause the judge or jury to give undue weight to the hearsay evidence of corroborating witnesses (*Shwe Kin v. R*, 3 LBR 240:5 Cri Lj 411; *Nistarini v. Nando* Lal, 5 CWN xvi).

Thus the proper stage of the trial at which a former statement must be proved is ordinarily after the witness whom it is intended to corroborate has given evidence. Exhibit D43 was referred to the accused at the close of his examination-in-chief. That is appropriate. But it does not amount to proof of exh. D43. Former statements under s. 157 must be proved by anyone to whom it was made (see *Heymerdinguer v. R* 58 IC 344). The *Law of Evidence* by Monir 10th edn, vol 2 in referring to this case says at p. 1496:

> If the statement was reduced into writing, it must be proved by the production of the record and by evidence of the person who recorded it. A deposition as well as a first information report is a matter required by law to be reduced into writing. Therefore where the statement was made in the form of a deposition or a first information report to the police, oral evidence will be inadmissible and the statement must be proved under section 91 by the production of the record.

Similarly *Field's Law of Evidence* 12th edn, vol 5, says at p. 4924:

> It is settled law that a person cannot corroborate himself. But if, in support of a person's evidence, it is proved from another source that he did make statement of a kind similar to his evidence then the fact thus proved may be taken as corroborative of such person's statement (*King v. Nga Myo* AIR [1938] Rang 177).

If necessary, a witness will be allowed to be recalled to give evidence under s. 157 after the person sought to be corroborated has given his evidence (see *Nistarini v. Nando Lal* 5 CWN xvi). In *Muthu Goundan v. Chinniah* AIR [1937] M 86 corroborative evidence given before the giving of evidence sought to be corroborated, was ruled out. PW12 was not recalled to formally tender it in evidence after the accused had given evidence on it. The fact that the accused admitted having made exh. D43 and said that it is similar to his evidence does not thereby make it admissible. It only adds weight to the evidence of the person who gives evidence in corroboration (see *Ramratan v.*

State AIR [1962] SC 424; *Misri v. Emperor* AIR [1934] S 100). Thus exh. D43 has not been properly proved by the defence and is therefore inadmissible. It follows that the prosecution submission on the effect of the defence having adduced contradictory evidence must collapse. I pause to refer to *PP v. Lin Lian Chen* [1992] 1 CLJ 2086; [1992] 1 CLJ (Rep) 285 where Edgar Joseph Jr SCJ in dealing with the admissibility of a cautioned statement which is exculpatory in nature in the course of the case for the prosecution said:

> In this, we consider, the trial judge was entirely correct for even though the recording officer had not been called for the prosecution, the statement was that of the respondent who had personal knowledge of the facts stated therein and who had authenticated it by signing it. In other words, it was the respondent who was the author thereof and who had himself wished it to be admitted, it being acknowleged by him in the cautioned statement itself, that it was made voluntarily after due administration of the statutory caution.

This proposition of law cannot be disputed. However, it must be observed that in that case the statement was not introduced in evidence under s. 157 but for different purposes. Any such extension of the rule to proof of a previous statement under s. 157 would amount to the witness corroborating himself. It is for that reason that the person to whom the statement was made must be called to tender it. I interpolate to add that at the close of the case for the prosecution I had informed parties that exh. D43, tendered in evidence through PW12, was inappropriately proved at that stage as it ought to have been done so only after the witness it is meant to corroborate has given evidence. Accordingly, I had ruled that exh. D43 could not be admitted at that stage and that it can be used by the defence only at the appropriate stage.

Notwithstanding my primary finding I shall now consider the legal status of exh. D43 if it can be argued that proof of it by PW12 in the course of the case for the prosecution is sufficient. It is of critical importance to remember that s. 157 renders the former statement of a witness admissible only to corroborate the evidence given by him in court. The word "corroborate" is defined in *Black's Law Dictionary* as:

> To strengthen; to add weight or credibility to a thing by additional and confirming facts or evidence. The testimony of a witness is said to be corroborated when it is shown to correspond with the representation of some other witnesses, or to comport with some facts otherwise known or established.

It is therefore clear that s. 157 permits the former statement of a witness to be admitted for the purpose of strengthening or confirming his evidence in court and certainly not to contradict such evidence. In *Karthiyayani & Anor v. Lee Leong Sin & Anor* [1975] 1 MLJ 119 it was held that a former statement of a witness is admissible to corroborate him if it is consistent with the evidence given by him in court. Where, therefore, there is nothing in a witness' evidence in court which may be corroborated by his former statement, the statement is not admissible (see *Misri v. Emperor* AIR [1934] S 100). Accordingly, it was held in *In re Grandhe Venkatasubbiah* [1925] 86 IC 209 that a former statement is not admissible under s. 157 of the Indian Evidence Act (similar to our s. 157) when it does not corroborate any evidence given by the witness in court. It must also be noted that it is only those parts of a statement which are necessary to corroborate a witness that can be admitted under s. 157 (see *Mt Hakima v. Mt Jiandi* AIR [1927] Sind 209). Where therefore a former statement is contained in a lengthy document it would be prudent to mark those parts that are to be used as corroborative evidence. If this practice had been followed in this case the contradictory part of exh. D43 would certainly have opened the eyes of the defence. The corollary is that since the relevant part of exh. D43 contradicts the evidence of the accused it is not admissible in evidence under s. 157. It follows that even on the alternative approach exh. D43 is not admissible with the same result as I have explained earlier.

When I drew the attention of the prosecution to the line of argument I have adopted the learned Deputy Public Prosecutor contended that exh. D43 is also admissible under s. 113 of the Criminal Procedure Code ("s. 113") and must therefore be considered. Section 113 provides for the admissibility of a statement made to the police by an accused and for its use for the purpose of impeaching his credit. The first part deals with the admissibility of a statement to the police. Evidence is described as admissible if, in addition to being relevant, it is not disqualified by some exclusionary rule (see *Evidence: Proof and Practice* by Graham Roberts p. 73). Relevance, however, does not result in evidence being admissible: it is a condition precedent to admissibility (see *R v. Turner* [1975] 1 All ER 70). Not all admissible evidence is universally relevant (see *R v. Kilbourne* [1973] AC 729). That is not the end of the matter. Evidence which is relevant and admissible must be proved before it can be considered by the court. In further elaboration on the relationship between admissibility and proof I refer to *Sarkar on Evidence* 15th edn, vol 1, p. 87:

> The distinction between 'proof' and 'relevancy' should have to be borne in mind. In a trial the first question that presents itself is – What facts will a party be allowed to lay before the court. This is a matter of relevancy and is determined by the pleadings or the facts in issue. The next question is – How

> will the court allow the party to prove those admissible facts? This is a matter of proof. Part I of the Act containing ss. 6-55 deals with the relevancy of facts and Part II deals with their proof.

In commenting on the improper proof of a fact *Field's Law of Evidence* 12th edn, vol 1, says at p. 421:

> Facts which are not properly proved cannot be considered by the Judge and cannot form the basis of a judgment.

And at p. 423:

> If the Evidence Act prescribes a particular manner in which evidence is to be given, evidence must be given in that manner and in no other manner.

Thus s. 165 of the Act provides that it is only those facts which are declared to be relevant and duly proved which can be the basis of a judgment (see *Miyana Hasan Abdulla v. State of Gujarat* AIR [1962] Guj 214; *Sris Chandra Nandy v. Rakhlananda* AIR [1941] PC 16). It is therefore clear that a fact which is relevant and admissible must be proved in the manner prescribed in the Act, if any. In the case of a previous statement, like a statement to the police, specific provisions have been prescribed in the Act for its manner of proof like, for instance, ss. 145 and 157. These provisions must be followed before a previous statement can be used in evidence. The corollary is that a police statement under s. 113 is admissible only if it satisfies the requirements of proof of, *inter alia*, ss. 145 and 157. It follows that the argument of the learned Deputy Public Prosecutor cannot be sustained.

The resultant matter for determination is whether the prosecution can make use of exh. D43 since it is inadmissible for the purpose in respect of which it was tendered by the defence. This raises the broader issue of whether evidence which is inadmissible can be used for another purpose. In order to resolve this issue I find it necessary to refer to *Cross on Evidence* 6th edn where it says at p. 54:

> If evidence is admissible for one purpose, it cannot be rejected on the ground that it is inadmissible for some other purposes. It is desirable that in such circumstances the two purposes are kept clearly distinguished in the mind of the trier of fact.

Wigmore described the principle involved as one of multiple admissibility. As this may indicate that evidence may be admissible for more than one purpose Ormiston JA has suggested "multiple relevance and limited admissibility" as sounder; the evidence is relevant for several purposes but it is admissible for only one purpose or for a limited number of purposes (see *R v. Georgiev* [2001]

119 A Crim R 363). Thus if a wife petitions for divorce on the ground of her husband's adultery with a named woman, and she calls a witness to prove an admission of adultery by the respondent the evidence is admissible in order to establish the husband's guilt because admissions may always be proved against their maker under an exception to the rule against hearsay, and the evidence is admissible although the rule prevents it from being used against the named woman. Accordingly a court may find that A's adultery with B is established although B's adultery with A is not proved (see *Rutherford v. Richardson* [1923] AC 1; *Moreton v. Moreton* [1937] 1 All ER 470). It is a rule that is fraught with danger. As Tindall CJ said in *Willis v. Bernard* [1932] 8 Bing 376 at p. 383:

> No doubt it renders the administration of justice more difficult when evidence which is offered for one purpose or person, may incidentally apply to another; but that is an infirmity to which all evidence is subject, and exclusion on such a ground would manifestly occasion greater mischief than the reception of the evidence.

I must point out that the rule of multiple admissibility that I have discussed thus far refers only to evidence which is properly on record for one purpose for which it is admissible and which is inadmissible for another purpose. However, in the case at bar exh. D43 has been ruled as inadmissible for the purpose in respect of which it was tendered and marked as an exhibit and is sought to be used for another purpose. Evidence that is inadmissible remains inadmissible (see *Goh Beng Seng v. Dol bin Dolah* [1970] 2 MLJ 95; *Saludin bin Surif v. PP* [1997] 3 CLJ 529; *Noliana bte Sulaiman v. PP* [2001] 1 CLJ 36). That, to my mind, does not mean that it cannot be used for another purpose. If it is desired to be so used it must, however, satisfy the rules of admissibility of the other purpose in respect of which it is intended to be used. It is only then that it can be brought back on record in accordance with law in view of the earlier ruling on its inadmissibility. This is logical following the established rules relating to the admissibility of documentary evidence. It falls upon the party seeking to produce a document to show that it is admissible (see *Tsia Development Enterprise Sdn Bhd v. Awang Dewa* [1984] 1 MLJ 301). It is the responsibility of the party relying on a document to ensure that it is properly tendered, proved and thereafter marked (see *Chong Khee Sang v. Pang Ah Chee* [1984] 1 MLJ 377; *Wan Nafi bin Wan Ismail v. Hajjah Lijah bte Omar & Ors* [1996] 5 MLJ 534). Documents which have not been properly proved and admitted as such will have to be disregarded (see *PP v. Datuk Haji Harun bin Haji Idris & Ors* [1977] 1 MLJ 180; *Alliedbank (M) Bhd v. Yau Jiok Hua* [1998] 2 CLJ 33). However, in *Lim Heng Soon & Anor v. PP* [1970] 1 MLJ 166 it was held that there was no substantial miscarriage of justice when an exhibit produced in court but not taken into custody by the

court and marked as an exhibit was used as evidence. Ideally, therefore, the prosecution ought to have ensured that exh. D43 was marked as a prosecution exhibit. Failure to do so does not deprive it of its evidential effect provided, of course, that its rules of admissibility with respect to the purpose for which it is intended to be used have been complied with. It is only then that exh. D43 can be used by the prosecution.

What therefore warrants consideration is whether the prosecution has fulfilled the rules of admissibility of exh. D43 in order to use it. The first submission of the prosecution in its use relates to its effect on the credit and credibility of the accused. Credit is governed by s. 145 read with s. 155(c) of the Act while credibility is governed by s. 146 of the Act. Both the concepts are inter-related. As Yong Pung How CJ said in *Kwang Boon Keong Peter v. PP* [1998] 2 SLR 592 at p. 602:

> Nokes, in the fourth edition of *An Introduction to Evidence* at pages 407-408, sought to define and distinguish between credit and credibility. The learned author stated that credit involves 'antecedents, associates, character, impartiality and consistency' while credibility concerns the 'opportunities for a power of observation of the witness, his accuracy for recollection, and capacity to explain what he remembers.' It can thus be deduced that the credit of a witness refers to his character and moral reliability whereas the credibility of a witness refers to his mental capacity and power to be a witness of veracity.
>
> There is a close relationship between the credit and credibility of a witness. The credit or discredit relates to his credibility.

His Lordship further said (at p. 602) that if a witness' testimony is inconsistent with a previous statement made by him that statement may be put to him in cross-examination to challenge his credit if the inconsistency will affect his credibility and likely standing with the trier of fact. That is the nexus between credit and credibility. In *Nahar Singh v. Pang Hon Chin* [1986] 2 MLJ 141 it was held that where the credibility or character of a witness is impugned he should be given an opportunity of exculpating himself a breach of which is a violation of the elementary demands of natural justice. It is therefore clear that where the credibility of a witness is challenged on the basis of a previous inconsistent statement made by him he must be confronted with it. This would require compliance with s. 145. In this regard *Sarkar on Evidence* 15th edn, vol 2, says at p. 2226:

> Former contradictory or inconsistent statements of a witness can be used under s. 146 to shake his credit or test his veracity (*Bhagwan Singh v. S, A* [1952] SC 214). With regard to previous inconsistent statement, the law expressly requires that the witness's attention must first be drawn to such statements for the purpose of contradiction (ss. 145 and 155 cl (3)).

As exh. D43, a previous statement of the accused, is in writing the relevant part of s. 145 that is applicable is its sub-s. (1) which reads as follows:

> A witness may be cross-examined as to previous statements made by him in writing or reduced into writing, and relevant to matters in question in the suit or proceeding in which he is cross-examined, without the writing being shown to him or being proved; but if it is intended to contradict him by the writing, his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose of contradicting him.

It becomes immediately apparent that the sub-section contemplates two limbs. They are:

(a) cross-examination of witness on the previous statement without it being shown to him or being proved;

(b) attention being drawn to witness to those parts of the previous statement which are to be used for the purpose of contradicting him before the writing can be proved.

In commenting on the two limbs of the sub-section Thomas J said in *Binay Kumar Singh v. State of Bihar* [1997] 1 SCC 283 at pp. 290-291:

> It is provided in the first limb of section 145 that a witness may be cross-examined as to the previous statement made by him without such writing being shown to him. But the second limb provides that 'if it is intended to contradict him by the writing his attention must, before the writing can be proved, be called to those parts of it which are to be used for the purpose for contradicting him'. There is thus a distinction between the two vivid limbs, though subtle it may be. The first limb does not envisage impeaching the credit of a witness, but it merely enables the opposite party to cross-examine the witness with reference to the previous statements made by him. He may at that stage succeed in eliciting materials to his benefit through such cross-examination even without resorting to the procedure laid sown in the second limb. But if the witness disowns having made any statement which is inconsistent with his present stand, his testimony in court on that score would not be vitiated until the cross-examination proceeds to comply with the procedure prescribed in the second limb of section 145.

It would appear from the passage that I have reproduced above that the need to comply with the second limb arises only if the witness disowns having made the previous statement. With respect, I am unable to agree with that view. Nowhere does the second limb say that it is activated only if the witness disowns having made the previous statement. All that it says is that if it is intended to contradict the witness by his writing his attention must be called to those parts of it which are to be used for the purpose of contradicting him before the writing can be proved. The writing can be proved by an admission from the witness or calling persons to whom the statement was made. In both events the witness must be given an opportunity of explaining the inconsistency. In support I refer to the celebrated case of *Muthusamy v. PP* [1948] MLJ 57 where Taylor J said at p. 59:

> If the witness admits making the former statement, or is proved to have made it, then the two conflicting versions must be carefully explained to him, preferably by the court, and he must have a fair and full opportunity to explain the difference.

This becomes clear if it is appreciated that it is an elementary principle of law that if previous statements made by a witness are to be used for the purpose of contradiction he must be confronted with those statements and be given an opportunity of explaining any discrepancy. If a previous statement is to be allowed to be put in evidence against a witness in order to contradict him without giving him an opportunity to tender his explanation or to clear up the particular point of ambiguity or dispute it will be acting contrary to general principles of law (see *Charandesi Debi v. Kanai Lal* AIR [1955] Cal 206). As the Privy Council said in *Bal Gangadhar Tilak v. Shrinivas* AIR [1915] PC 7:

> On general principles it would appear to be sound that if a witness is under cross-examination on oath, he should be given the opportunity, if documents are to be used against him, to tender his explanation and to clear up the particular point of ambiguity or dispute. This is a general, salutary and intelligible rule, and where a witness' reputation and character are at stake, the duty of enforcing this rule would appear to be significantly clear.

Thus in *Ram Pratap v. S* AIR [1963] Pat 153 it was held that when the writer of a letter marked as an exhibit gives evidence, any endorsement on its back making a statement contradictory to the one made in court, cannot be used unless the witness' attention is drawn to it. The manner of bringing the previous statement to the attention of the witness is important. As Bose J said in *Bhagwan Singh v. The State of Punjab* [1952] SCR 812 at p. 822:

> There can be no hard and fast rule. All that is required is that the witness must be treated fairly and be afforded a reasonable opportunity of explaining the contradictions after his attention has been drawn to them in a fair and reasonable manner.

It is not enough to say whether a particular exhibit is his previous statement (see *Samuel v. R* AIR [1935] All 935; *Raghuraj v. R* AIR [1934] All 956). Unless the particular matter or point in the previous statement is placed before the witness sought to be contradicted for explanation the previous statement cannot be used in evidence for the purpose of contradiction (see *Upendra v. Phupendra* 21 CWN 280; *Muharram Ali v. Barkat Ali* AIR [1930] Lah 695; *Panji v. S* AIR [1965] Or 205). In the circumstances I am unable to agree that the case of *Bhagwan Singh v. The State of Punjab* [1952] SCR 812 advocates the proposition, as argued by the prosecution, that when a witness admits making the previous statement there was no necessity to comply further with s. 145. What that case says is that if the previous statement is admitted "… all that is necessary is to look to the former statement of which no further proof is necessary because of the admission that it was made." This simply means that the admission of the statement only makes further proof of it unnecessary. In support I refer to the *The Law of Evidence* by ERSR Coomaraswamy, vol II Book 2 where, in commenting on that case, it says at p. 750:

> If the witness admits the statement, no further proof is necessary.

That does not mean that the witness is not entitled to an opportunity to explain the discrepancy as contemplated by s. 145(1). As ERSR Coomaraswamy further says at p. 752:

> It is not sufficient to ask a witness whether he did or did not make a certain statement to the sub-inspector unless the witness in answer to the question admits that he made such a statement. In that case, if the statement is contradictory of something else which the witness has said, it is the duty of the cross-examiner to give the witness an opportunity of reconciling his statement.

In this case the contradictory part of exh. D43 was not referred to the accused for an explanation. All that he said in cross-examination in answer to questions is:

> When the statement was recorded the facts were fresh in my mind but I was a bit confused.

The failure by the prosecution to refer the specific contradictory part of exh. D43 to the accused means that s. 145(1) has not been complied with. It is a grave irregularity and renders the contradictory part of exh. D43 inadmissible (see *Tham Kishun v. Kausal Kishore* AIR [1958] Pat 294; *Emperor v. Ajit Kumar Ghosh* AIR [1945] Cal 159; *Emperor v. Rasul Bux* AIR [1942] Sind 122; *Paul v. State of Tripura* [1993] 2 Gau LR 395). It cannot therefore be used for the purpose of contradicting the accused. On similar ground the submission of the prosecution that exh. D43 amounts to an admission and that it can be used without being put to the accused for explanation cannot be sustained. This is particularly important in view of the fact that the contradictory part is not similar to the evidence of the accused as claimed by him. The case of *Bharat Singh v. Bhagirati* AIR [1966] SC 405, relied on by the prosecution, did not find favour with Ray CJ who said in *Sita Ram v. Ramchandra* [1977] SC 1712 at p. 1715:

> Second, even if the admission is proved in accordance with the provisions of the Evidence Act and if it is to be used against the party who has made it 'it is sound that if a witness is under cross-examination on oath, he should be given an opportunity, if the documents are to be used against him, to tender his explanation and to clear up the point of ambiguity or dispute. This is a general salutary and intelligible rule.' (see *Bal Gangadhar Tilak v Shrinivas Pandit* 42 Ind App 135 at p 147; AIR [1915] PC 7 at p. 11). … Therefore, a mere proof of admission, after the person whose admission it is alleged to be has concluded his evidence, will be of no avail and cannot be utilised against him.

In *Muharram Ali v. Barkat Ali* AIR [1930] Lah 695 it was held that where an admission is not put to the party making it and the party making it is not examined on it under s. 145 the admission is not legal evidence and cannot be used against the party making it. It follows that exh. D43 cannot be used against the accused even as an admission in the absence of having afforded him an opportunity to explain the contradiction. In any event the contradictory part of exh. D43 is not an admission as it is exculpatory in nature.

That leaves for consideration the prosecution's reliance on *R v. Gillespie* [1967] 51 Cr App R 172 to argue that exh. D43 is evidence against the accused. It must be pointed out that the proposition of law enunciated in that case is applicable, as stated in the passage from that case referred to earlier, only when the witness sees what the document purports to record and accepts it as true. In that event it can be said that the witness is adopting it as part of his testimony and accordingly, it becomes evidence against him. In this case the accused said that his evidence in court is similar to what he had stated in exh. D43 when it was shown to him. This, in my opinion, does not convert exh.

D43 into evidence against the accused for two reasons. Firstly, it must be remembered that in order to draw an inference on the basis of what a party is said to have admitted the admission must be unequivocal, comprehensive and cover the point in issue (see *M M Chetti v. C Coomaraswamy* AIR [1980] Mad 212). It sometimes happens that persons make statements which serve their purpose or proceed upon ignorance of the true position; and it is not their statements but the true position which should be taken into consideration in determining the issue (see *Venkatapathiraju v. Venkatanarasimha* AIR [1936] PC 264; *Harkishen v. Pratap* AIR [1938] PC 189). An erroneous admission does not bind the person making it (see *Mangru v. Shivanand* AIR [1923] All 575). Just as a wrong admission made in ignorance of legal rights has no binding effect (see *Munia v. Manohar* AIR [1941] Or 429; *Amrit v. Sadashiv* AIR [1944] Bom 233) a wrong statement made in ignorance of the true facts ought to have no effect. The evidence of the accused that exh. D43 is similar to his evidence is an incorrect, blind and ignorant assertion which is apparent on the face of the record. It is simply not similar. The admission of the accused cannot therefore amount to an acceptance of exh. D43 as the truth as it is equivocal. Thus it cannot be said that the accused has adopted exh. D43 as part of his evidence. Secondly, as I said earlier, even in the case of an admission the witness must be given an opportunity to explain the admission if it is to be used against him. The opportunity to explain the contradiction in exh. D43 is greater as it is not an admission and the evidence of the accused that it is similar to his evidence is not correct. If in fact the contradictory part of exh. D43 had been referred to the accused and he had accepted it as true then the need for an explanation may not arise as it would then fall outside the ambit of s. 145. In the circumstances the prosecution ought to have followed the procedure prescribed in s. 145 which was not done. Accordingly, I am unable to consider the contradictory part in exh. D43 as evidence against the accused. I had said in an earlier part of the judgment that PW9 had admitted that in his statement to the police he had stated that he first noticed what was happening after he had heard the first shot. This admission by PW9 is on the same footing as the admission of exh. D43 by the accused. If, therefore, I were to agree with the vigorous submission of the prosecution on this issue it would mean that I have to discredit PW9 as well. However, following my ruling on the contradictory part of exh. D43 the admission by PW9 does not affect his credit.

In the final analysis it is my primary finding that exh. D43 is inadmissible as PW12 was not recalled to tender it in evidence. My alternative finding is that even if it is properly before the court the contradictory part in exh. D43 is inadmissible under s. 157. Similarly it is inadmissible under s. 145 as the

prosecution has failed to comply with the requirements of the section. Exhibit D43 therefore does not affect the credibility of the accused. This finding makes it unnecessary for me to analyse the advice of the Privy Council in *Von Starck v. The Queen* [2000] 1 WLR 1270 where it was held that even if a defendant's evidence is inconsistent with his previous statement the contents of the previous statement must be given due consideration. Neither is it necessary for me to ascertain the veracity of the accused's oral evidence as opposed to what he had stated in exh. D43 as authorised by *Tan Chow Soo v. Ratna Ammal* [1969] 2 MLJ 49).

Whether The Deceased Uttered The Words "Kasilah Mati-lu" And Lu-mati"

The accused said in his evidence that the deceased said, "Kasilah mati-lu" and "Lu-mati" a number of times before the first shot was fired. On the other hand DW4 and DW5 said that they heard the words, "Tembaklah, tembaklah." The defence did not address any questions to DW4 and DW5 to ascertain whether there were other words uttered by the deceased which they could not hear. Neither was the accused asked whether the deceased could have uttered other words. In the circumstances it is my view that the words uttered by the deceased were as testified by DW4 and DW5. This part of the evidence of the accused is therefore an embellishment designed to enhance the impact of his plea of self-defence. However, it is my view that this is insufficient on its own to discredit the accused entirely.

The Evidence Of PW7 That The Accused Told Him That The Deceased Had Tried To Rob Him

PW7, a corporal, said that the accused told him that:

> Lelaki India tersebut telah memukulnya dengan kayu cuba hendak menyamunnya.

It was not put in cross-examination to PW7 that the accused did not utter those words to him. Neither did the accused deny saying it to PW7 when he gave evidence. It follows that the accused did in fact make such a statement to him. It is, however, not in line with the evidence adduced by the defence. If, therefore, what the accused told PW7 is admissible it would mean that it is yet another attempt by the accused to embellish his defence and may have the effect of impairing his credibility. The admissibility of the statement is governed by s. 113 pursuant to which it is only admissible if made to a police officer of the rank of inspector and above. As PW7 is a corporal the evidence is inadmissible. I am therefore precluded from considering this evidence in assessing the credibility of the accused.

I pause to add that I find what is stated in the last part of the submission of the learned Deputy Public Prosecutor on exh. D43 stimulating and provocative. In referring to exh. D43 she said:

> This is an unprecedented, novel and to a certain extent a mysterious way of defending an accused person ie by showing consistency through inconsistencies. By doing this they unwittingly had set their own trap of which they themselves were the victim.

I myself am unable to comprehend the mystery behind the tendering of exh. D43 in evidence. Perhaps the accused and his advisers will know the answer. But I do agree that by tendering the document in evidence the defence had certainly set its own trap. Unfortunately the prosecution did not take the proper and prudent steps to close the trap door. It was left wide open. It would appear that the defence was not sufficiently energenised to walk out of the open door. Where the victim of a trap ought not to be unlawfully trapped it is the duty of the court to pull it out with all its might in order to set it free. After all the function and responsibility of the court in a criminal trial is greater and more onerous than that of the prosecuting and defence counsel (see *Von Starck v. The Queen* [2000] 1 WLR 1270).

(ii) DW4

The prosecution submitted that the evidence of DW4 contradicted that of DW6 as to the point of time he told her of the incident. The evidence of DW6 makes it very clear that DW4 informed her of the incident upon his return to their office on the same day. In this regard DW4 said in his examination-in-chief,

> Saya sebenarnya terbaca suratkhabar Utusan yang muka hadapannya menceritakan tentang kes Dato Balwant dituduh membunuh. Jadi saya rasa Dato Balwant tidak bersalah kerana dia membunuh bukannya dengan niatnya dari apa yang saya lihat. Saya telah menceritakan perkara ini kepada kakak saya bernama Norzilah binti Ismail bagaimana perkara ini berlaku dan dia bersependapat dengan saya. … Saya tak ingat bulan apa saya beritahu kakak saya tetapi dalam tahun 2002.

This does not show in clear terms that DW4 did not tell DW6 of the incident on the same day. The prosecution ought to have cross-examined DW4 on this issue which was not done. In the circumstances I am unable to place much emphasis on the contradiction complained of, if any.

It was also submitted by the prosecution that:

DW4 in his evidence stated that it was his sister who encouraged him to give evidence for the defence. He has met the defence counsel many times and was interviewed by Dato' Shafee before his statement was recorded by the police. He said that he was not ready to inform the police (at page 99), 'Saya belum cukup bersedia untuk memberitahu pihak polis, maksud saya ialah untuk mengingati semula peristiwa. Sekurang-kurangnya saya bersedia untuk memberi keterangan kepada peguam. Saya bersedia apabila saya berjumpa dengan peguam. Selepas itu saya pun bersedia untuk memberi statement kepada polis. Sebelum perbicaraan peguam ada berjumpa dengan saya, peguam ada mencerita kepada saya berulang kali.' His evidence must be scrutinized carefully bearing in mind the fact as stated above.

If the implication of this submission is that the evidence of DW4 must be scrutinised with care as he had been interviewed by Dato' Shafee, one of the counsel for the accused, I am unable to accept it. I do not see anything wrong with counsel interviewing potential witnesses. It is a necessary process to enable them to conduct the defence effectively. If the objection is to be carried to its logical conclusion it would mean that all prosecution witnesses must be similarly treated as they, too, would have been interviewed earlier when statements were recorded from them. I must add that the situation would be different if there is evidence of perversion of justice by counsel of which there is none in this case. In the circumstances I am unable to agree that the objection I have referred to affects the credit of DW4.

I will now assess the salient features of the facts of the case as identified by me at the close of the case for the prosecution on the basis of the whole of the evidence adduced.

The Point Of Time At Which PW9 And PW10 Were First Attracted To The Incident

No evidence was adduced by the defence to alter my earlier finding that it is difficult to determine the point of time at which PW9 and PW10 were first attracted to the incident. That finding therefore remains.

Whether The Accused Was Pulled Out From The Car

It was my earlier finding that PW9 and PW10 did not know whether the accused was pulled out from the car. A finding on this issue therefore requires a consideration of the evidence adduced by the defence. The accused said that the deceased opened the car door and dragged him out forcefully by catching hold of the collar of his shirt. It was not put to the accused by the prosecution that he was not pulled out from the car. Instead the cross-examination proceeded on the basis that he was pulled out. In this regard the accused said in answer to questions:

I resisted when he dragged me out of the car. He was holding on to my collar. I held on to the seat. Despite that he dragged me out. I did not have my safety belt on at that time. He pulled me out by holding my collar. In the course of resisting I did not knock against the car.

DW5 said that the deceased opened the door of the car suddenly and dragged the accused out. Unlike in the case of the accused it was put to DW5 that the accused came out of the car by himself holding the gun. She denied this suggestion. DW4, on the other hand, said that as his view was not very clear at that time his impression was that it was as if the accused was pulled out from the car. In cross-examination he said that he saw the accused coming out of the car. However, in his re-examination he said that the accused was forced to come out as if he was pulled out. The vague evidence of DW4 on this issue is an indication that his evidence is not a fabrication as suggested by the prosecution. If in fact he was lying his evidence would have been more emphatic. I have no reason to disregard the evidence of the accused and DW5 on this issue. The accused was not effectively cross-examined and DW5 denied the suggestion put to her.

It is therefore my finding that the accused was pulled out of the car by the deceased.

The Point Of Time At Which The Accused Took Out The Pistol

It was my earlier finding that PW9 and PW10 would not have known the point of time at which the accused took out the pistol. The accused said in his evidence that when the deceased kept assaulting him he showed the deceased his gun which was tucked at his waist. The deceased continued to assault him with the stick and it landed on his upper arm. The accused said that he was frightened for his life and took out his gun and fired a warning shot. There was no cross-examination of the accused by the prosecution as to the point of time he took out his pistol. His evidence on this issue must therefore be accepted. DW5 said that the accused lifted up his shirt, presumably to show his pistol, when the deceased was assaulting him. When the deceased became more aggressive the accused pulled out the gun and fired a shot. Unlike in the case of the accused it was put to DW5 that the accused came out of the car by himself holding the gun. She denied this suggestion. DW4 did not, neither in his examination-in-chief nor cross-examination, advert to the point of time at which the accused took out his pistol. This again shows that he is a witness of truth because if he is lying he would have corroborated the evidence of the accused and DW5 on this issue.

It is therefore my finding that the accused took out his pistol as explained by him.

Whether The Deceased Had The Stick With Him Before The First Shot Was Fired By The Accused

It was my earlier finding that the prosecution evidence on this issue is contradictory. While PW9 said that the deceased took the stick only after the first shot was fired by the accused PW10 said that the deceased had the stick with him before the first shot was fired. The accused said that as his car was slowly moving near the junction of Jalan Maarof/Jalan Tempenis he saw the deceased going up Jalan Tempenis and picking up a stick. His cross-examination proceeded on the basis that the deceased had the stick with him before the first shot was fired. It was not suggested to him that the deceased did not have the stick at that time. Therefore I am compelled to accept what he said in his examination-in-chief. The evidence of DW5 in her examination-in-chief is similar to that of the accused. However, it was put to her in cross-examination that after the first shot was fired the deceased ran to the other side of the road and came back with the stick. She denied the suggestion. DW4 said that the deceased picked up the stick before going to the Mercedes Benz car. It was put to DW4 that the deceased picked up the stick after the first shot. He denied it. In view of the evidence of PW10 on this issue, the manner of cross-examination of the accused and the reliability of the evidence of DW4 and DW5 I accept their evidence.

It is therefore my finding that the deceased had the stick with him before the first shot was fired.

The Manner In Which The Deceased Used The Stick Before The Two Shots Were Fired

It was my earlier finding that the stick held by the deceased did not touch the accused and as it was moving up and down very fast it was not possible to place much emphasis on the prosecution evidence that at the time of the second shot it was pointed downwards. DW5 said that she saw the deceased swinging the stick and was trying to hit the accused's hand or face who tried to ward off the blow. It landed on his upper left arm. She also saw the deceased jabbing the accused's chest with the stick. He kept on doing so. It was after that the first shot was fired. She said that the accused begged the deceased not to hit him. It was a faint voice. The deceased kept on jabbing the accused and she heard the second shot. Just before the second shot was fired the deceased was about to swing the stick at the accused. In her cross-examination she said that after the first shot the deceased was very aggressive and angry. The accused was pleading with him not to hurt him. The stick was on the chest of the accused. She said that before the second shot was fired she saw the deceased swinging the stick but did not see it touching the accused. She denied that when the second shot was fired the deceased's hand was down. She also denied that

the deceased was swinging the stick up and down. DW4 said that the deceased swung the stick at the accused several times. The deceased jabbed the stick at the accused's chest. Prior to the second shot the deceased was holding the stick in a position of hitting the accused. It was not put to him in cross-examination that the stick did not touch the accused. The accused said that the deceased poked his chest with the stick. When the stick moved towards his face he warded off the stick. It landed on his upper arm. The deceased poked the accused with the stick and kept aiming at his face. The deceased then jabbed the accused's chest with the stick. When the accused showed the gun to the deceased he swung the stick at him again. It landed on his upper arm again. After the first shot was fired the deceased lunged the stick forcefully at the accused's chest. The accused said that as a result of the assault he was injured in his arm and chest. It must be observed that the prosecution version of the use of the stick, that is to say, that it did not touch the accused and that prior to the second shot the deceased was holding the stick down was not put to the accused. Neither was it suggested to him that the injuries he had sustained were not caused by the deceased. DW3 said that the two injuries on the accused are consistent with his complaint of having been assaulted with a wooden stick. In the circumstances I accept the accused's evidence that he was hit with the stick by the deceased and that as a result thereof he sustained the two injuries.

It is therefore my finding that the stick held by the deceased did in fact touch the accused.

Whether The Deceased Was Wearing His Helmet At The Time Of The Incident

It was my earlier finding based on the evidence of PW9 and PW10 that the deceased was wearing his helmet at the time of the incident though I observed that no evidence was led by the prosecution to explain how the helmet was found hanging on the rear view mirror of the motorcycle. The accused said that at the time of the incident the deceased was not wearing his helmet. He was not cross-examined on this part of his evidence. DW5 said that the deceased took off his helmet and left it on the motorcycle before coming towards them. She was not cross-examined on this part of her evidence. DW4 also said that the deceased removed his helmet and placed it on his motorcycle before going towards the car. It was not put to him that the deceased was wearing the helmet at the time of the incident. In the absence of the defence witnesses being cross-examined on this issue I accept their evidence.

It is therefore my finding that the deceased was not wearing his helmet at the time of the incident contrary to the evidence of PW9 and PW10. This finding explains the position of the helmet after the incident.

Events Preceding The Shooting Incident At The Junction Of Jalan Maarof/ Jalan Tempenis

The prosecution evidence is silent on this issue. The accused, DW4 and DW5 gave a detailed account as to what transpired from the Railway Station at Jalan Raja till the shooting incident at the Jalan Maarof/Jalan Tempenis junction. According to the accused it started with the sounding of the horn of the car that DW5 was driving when another car came close to them. When they stopped at the traffic light near the Syariah Court the deceased who was ahead of them on his motorcycle turned round and came to the driver's side of their car against the flow of traffic. The deceased abused them. When the traffic light turned green they moved on. The deceased was waiting for them at the bus stop near the museum. He asked them to stop but they proceeded. Then they heard some sound from behind. The deceased was near the rear mudguard of the car. At the junction of Jalan Travers and Brickfields the deceased was ahead of them. The deceased turned back and came towards them. He abused them and looked very angry and threatening. When the traffic light turned green the deceased disappeared and they proceeded. At the junction of Jalan Bangsar/Jalan Maarof the traffic light was showing red. The deceased was waiting at the junction on the left. He abused them again. When the traffic light turned green they moved off. When they were about 30 feet away from the Petronas Petrol Station DW5 gave a signal to turn left into Jalan Tempenis. When the accused noticed the deceased at the junction of Jalan Tempenis he asked DW5 to proceed straight. It was never suggested to the accused in cross-examination that the sequence of events as described by him did not take place. It was put to DW4 that parts of his evidence on this issue were fabricated. He denied the suggestion. I accept the defence evidence on this issue as all three witnesses are generally consistent with each other coupled with the fact that they were not effectively cross-examined.

I must reiterate that in making the above findings I did not overlook the fact that the accused had laced certain parts of his evidence with embroidery. Accordingly, I subjected the assessment of his credibility to the highest levels of stringency. I took anxious steps to verify whether his evidence is consistent with itself and the whole of the evidence against the background of his demeanour while testifying. My assessment on his credibility was facilitated to a large extent by a lack of cross-examination on vital parts of his evidence as demonstrated by me earlier. It is a general rule that failure to cross-examine a witness on a crucial part of the case will amount to an acceptance of the witness' testimony (see *Wong Swee Chin v. PP* [1981] 1 MLJ 212; *PP v. Abang Abdul Rahman* [1982] 1 MLJ 346; *Chua Beow Huat v. PP* [1970] 2 MLJ 29). With regard to DW4 there is no reason to doubt the veracity of his evidence as it is neutral in many aspects. If, in fact, he was fabricating evidence

as suggested by the prosecution he would have confirmed the evidence in more ways than what he did. His demeanour while giving evidence did not project him as a false witness. DW5 cannot be treated as an interested witness merely because she is the daughter-in-law of the accused.

The accused's case is one of private defence. The law on the right of private defence, on the facts of this case, is contained in ss. 96, 97, 99, 100 and 102 of the Penal Code. They read as follows:

Section 96

Nothing is an offence which is done in the exercise of the right of private defence.

Section 97

Every person has a right, subject to the restrictions contained in s. 99, to defend:

(a) his own body, and the body of any other person, against any offence affecting the human body;

(b) the property, whether movable or immovable, of himself or of any other person, against any act which is an offence falling under the definition of theft, robbery, mischief or criminal trespass, of which is an attempt to commit theft, robbery, mischief or criminal trespass.

Section 99

(1) There is no right of private defence against an act which does not reasonably cause the apprehension of death or of grievous hurt, if done, or attempted to be done, by a public servant acting in good faith under colour of his office, though that act may not be strictly justifiable by law.

(2) There is no right of private defence against an act which does not reasonably cause the aprehension of death or of grievous hurt, if done, or attempted to be done, by the direction of a public servant acting in good faith under colour of his office, though that direction may not be strictly justifiable by law.

(3) There is no right of private defence in cases in which there is time to have recourse to the protection of the public authorities.

(4) The right of private defence in no case extends to the inficting of more harm than it is necessary to inflict for the purpose of defence.

Explanation 1 – A person is not deprived of the right of private defence against an act done or attempted to be done, by a public servant, as such, unless he knows, or has reason to believe, that the person doing the act is such public servant.

Explanation 1 – A person is not deprived of the right of private defence against an act done, or attempted to be done, by the direction of a public servant, unless he knows, or has reason to believe, that the person doing the act is acting by such direction; or unless such person states the authority under which he acts, or, if he has authority in writing, unless he produces such authority, if demanded.

Section 100

The right of private defence of the body extends, under the restrictions mentioned in the last preceding section, to the voluntary causing of death or of any other harm to the assailant, if the offence which occasions the exercise of the right is of any of the following descriptions:

(a) such an assault as may reasonably cause the apprehension that death will otherwise be the consequence of such assault;

(b) such an assault as may reasonably cause the apprehension that grievous hurt will otherwise be the consequence of such assault;

(c) an assault with the intention of committing rape;

(d) an assault with the intention of gratifying unnatural lust;

(e) an assault with the intention of kidnapping or abducting;

(f) an assault with the intention of wrongfully confining a person, under circumstances which may reasonably cause him to apprehend that he will be unable to have recourse to the public authorities for his release.

Section 102

The right of privare defence of the body commences as soon as a reasonable apprehension of danger to the body arises from an attempt or threat to commit the offence, though the offence may not have been committed; and it continues as long as such apprehension of danger to the body continues.

The provisions of law that I have referred to must be read together. In Malaysian law the right of private defence under the Penal Code is much wider than that under English law (see *Musa bin Yusof v. PP* [1953] MLJ 70). The right of private defence commences as soon as there is reasonable apprehension of danger to the body of a person and this right continues for so long as such apprehension of danger to his body or life exists (see *PP v. Ngoi Ming Sean* [1982] 1 MLJ 24; *Ya bin Daud v. PP* [1996] 2 CLJ 540). It must, however, be noted that the right has a limitation (see *PP v. Lee Poh Chye & Anor* [1997] 4 MLJ 578). If a person either has time to have recourse to seek the protection of a public authority (see *PP v. Ngoi Ming Sean* [1982] 1 MLJ 24) or inflicts more harm than is necessary for the purpose of defending his life and limb then such a right will no longer be available (see *Lee Thian Beng v. PP* [1972] 1 MLJ 248). In this regard it must be noted that whilst it is true that no man can be expected to assess with scientific accuracy the precise amount of force that is necessary to defend himself from an attack, any retaliation in the exercise of private defence should not exceed what is reasonably necessary to avert the assailant's attack (see *Mallal's Penal Law*, p. 134). Thus an accused person should not be allowed to put his superiority to such use so as to beat up the assailant (see *PP v. Lee Twe Jeat* [1994] 3 SLR 219) but merely to defend himself. However, it must be noted that a man who is about to be attacked does not have to wait for his assailant to strike the first blow (see *Beckford v. R* [1987] 3 All ER 425). He need not wait till he is actually attacked or inflicted with injury in order to react (see *Govindan v. State of Kerala* [1960] 47 AIR 258). He is not obliged to run away; the law does not require a citizen to behave like a coward (see *Mohd Khan v. State of Madhiya Pradesh* [1972] Cri LJ 661 of 662). If he is unable to escape, he may turn round and attack (see *PP v. Yeo Kim Bok* [1971] 1 MLJ 204). He need not cooly reflect on his right or measure his blows before defending himself. Thus when a person is attacked by a stick it is impossible to calculate the force of the blow before he can act (see *Iman Din v. Emperor* [1925] AIR Lahor 514). The law does not require that the person should have exercised a calm and cool judgment and that he should weigh his acts in golden scales (see *State of UP v. Ram Swarup* [1974] Cri LJ 1035; *Jai Dev v. State of Punjab* [1963] AIR SC 612; *Wassan Singh v. State Punjab* [1996] Cri LJ 878). The person does not have to be inflicted with serious injury before the exercise of the right of private defence can begin (see *Ya bin Daud v. PP* [1997] 4 MLJ 322; *Beckford v. R* [1987] 3 All ER 425). A person is not bound to modulate his defence step by step before the right to defend himself can begin (see *Sitaram v. Emperor* [1925] 26 Cri LJ 587 At 589). He can make sure that his defence is effective. Thus a person having reasonable grounds to believe the existence of imminent danger can use a gun in self-defence (see *R v. Collin Chisom* [1963] 47 Cr App R 130; *Bhagwan Swarop v. State of MP* [1992] Cri LJ 777). He may

inflict injuries on his aggressor for the purpose of defence as well as for preventing further aggression. Therefore if there is an apprehension of further violence the right of private defence comes in (see *Re Amnu Pujary* [1942] 43 Cri LJ 753). It is not only the injuries already inflicted but the injuries the attacker might inflict if the defender does not exercise his right of self-defence that must be taken into consideration (see *PP v. Yeo Kim Bok* [1971] 1 MLJ 204). Thus a person is not obliged to wait until the attack upon him is repeated (see *R v. Conlon* [1993] 69 Crim R 92). Even if the aggressor is disarmed but there is a possibility of him wrestling the weapon from the defender the latter has a right to use violence. The fact that the aggressor was unarmed while the accused was armed with a revolver cannot affect the right of private defence (see *PP v. Ngoi Ming Sean* [1982] 1 MLJ 24). When an injury is inflicted upon a person by a stick he can use his gun to defend himself (see *Bhagwan Swarop v. State of MP* [1992] Cri LJ 777). In *PP v. Yeo Kim Bok* [1971] 1 MLJ 204 it was held that a reasonable apprehension of danger and the right of private defence in relation to that fear extended to even the killing of the aggressor. The person who is facing a reasonable apprehension of danger to his body or life is not obliged to retreat but may pursue his adversary till he finds himself out of danger, and if in a conflict between them, he happens to kill, such killing is justifiable (see *R v. Mc Innes* [1971] 3 All ER 295; *Musa bin Yusof v. PP* [1953] MLJ 70; *Ya bin Daud v. PP* [1997] 4 MLJ 322). In any case where a plea of self-defence has been raised the prosecution has to show beyond reasonable doubt that the accused did not act in self-defence and even if the prosecution succeed the other possible issues will remain, including whether there was the necessary intent to constitute the crime of murder (see *Palmer v. R* [1971] 1 All ER 1077 of 1085; *Tony ak Beliang v. PP* [2003] 1 CLJ 482; *Kesha v. State of Rajasthan* [1993] Cri LJ 3674). This means that even if the court is left in reasonable doubt about the existence of the right of private defence there must be an order of acquittal (see *Zecevic v. DPP* [1987] 162 CLR 645).

The test of a reasonable cause of apprehension of death or of grievousness is an objective test (see *Ya bin Daud v. PP* [1997] 4 MLJ 322; *Soosay v. PP* [1993] 3 SLR 272). The burden of proving the defence of private defence is upon the accused on a balance of probabilities a (see *PP v. Teo Eng Chen & Ors* [1988] 1 MLJ 156; *Ya bin Daud v. PP* [1997] 4 MLJ 322; *Mohd Ramzani v. State of Delhi* [1980] Cri LJ 1010; *State of UP v. Ram Swarup* [1974] Cri LJ 1035; *Lee Thian Beng v. PP* [1972] 1 MLJ 248).

I will now consider whether the accused was confronted with a reasonable apprehension of danger to his body. The train of events that resulted in him being charged with an offence of murder commenced with the mere hooting of a car horn while DW5 was driving his car near the Railway Station at Jalan Raja with him in the front passenger seat. The deceased, riding a motorcycle, overtook them on the left. Then a car came into DW5's lane. She hooted in order to warn the driver of the car who then moved on to his lane. When they stopped at the traffic light near the Syariah Court the deceased who was about 30 feet ahead of them turned round and came towards the driver's side of their car against the flow of traffic. He started abusing them in vulgar language. He would not listen to their explanation that the hooting was not directed at him. Later when they passed the bus stop near the museum he asked them to stop. They ignored him and carried on driving. Suddenly they heard a sound from behind the car and noticed the deceased near the rear mudguard. DW4 saw the deceased removing his helmet and swinging it towards the car. The deceased then overtook them. At the junction of Jalan Travers and Brickfields the traffic light was showing red. The deceased was in front of them. When they stopped he turned back once again and came towards them. He was very abusive and looked angry and threatening. He challenged the accused to a fight. When the traffic light turned green they started moving. The deceased disappeared from their view. When they arrived at the junction of Jalan Bangsar and Jalan Maarof the traffic light was showing red again. When the light turned green they could not move as the deceased was in front of them. He was shouting and abusing them. When somebody from behind hooted the deceased moved away. When they were near the Petronas Petrol Station DW5 gave a signal to turn left into Jalan Tempenis. The deceased had already reached the junction of Jalan Tempenis and was looking behind every now and then. Fearing that the deceased might follow them the accused told DW5 to drive straight ahead. They could not do so as the traffic had stopped. PW10 confirmed that there was a traffic jam at that time. The deceased went up Jalan Tempenis and picked up a stick. He then did a U-turn and came back to the right hand side of the junction. He parked his motorcycle at the junction. He placed his helmet on the motorcycle. By that time the accused's car had stopped at the centre of the junction.

The deceased then walked towards the car. He was waving the stick and looked very angry and aggressive. He came to the passenger side of the car and was shouting and yelling abusive words. He then kicked the car and opened the door and dragged the accused out of the car by his collar. The deceased was angry, intimidating and threatening. He looked as if he was possessed by a demon. The accused's efforts to explain matters to the deceased were fruitless. The deceased then poked the accused with the stick he was holding and moved

it towards his face. When the accused warded off the stick with his hand it landed on his upper arm. The deceased kept on poking and jabbing the accused's chest. The accused got the impression that the deceased was going to cause him grievous harm or even kill him. The accused then showed his gun to the deceased hoping that it would frighten him so that he will stop assaulting him. But the deceased became even more aggressive and angry at that point of time and swung the stick again to hit the accused. When the accused raised his arm it landed on his upper left arm. The accused became really frightened for his life and took out his gun and fired a warning shot in the air. The deceased did not retreat but instead lunged the stick forcefully at the accused's chest. The accused sustained injuries on his hand and chest as a result of the assault. Then the accused genuinely feared for his life and felt that the deceased was either going to cause him grievous hurt or even kill him. The accused also feared that the deceased might dislodge the gun from his hand by hitting his hand and use it to shoot him. The accused had this fear as the deceased was taking another swing. The deceased was behaving like a mad man as if he was possessed. He was shouting, threatening and intimidating. At that stage the accused thought that he had to disarm the deceased. He felt that if he did not disarm the deceased he would assault him further and his life would be in danger. The accused then fired the second shot towards the right of the deceased hoping that he would drop the stick and stop assaulting him. His intention was to incapacitate or maim the deceased. Unfortunately the shot killed the deceased.

It is my view that the accused did everything possible to pacify the aggression of the deceased. He tried to explain matters to the deceased who was not bothered; he showed his gun to the deceased who became even more aggressive. He then fired a warning shot which did not deter the deceased. Even PW9 said that the deceased was not scared at all by the first shot which, in his opinion, was a warning shot. The action and behaviour of the deceased was not only aggressive but was that of a road bully who had no regard or respect for the law from the very beginning at the traffic light near the Syariah Court. His conduct is comprehensible in the light of his earlier detention for being involved with secret society activities followed by a period of restricted residence. Even the motorcycle that he was riding on that day had been reported as stolen. In the situation that the accused was in there was no way in which he could have sought the protection of a public authority, or for that matter, of anybody else. As a matter of fact the accused made an attempt to avoid going to Jalan Tempenis by proceeding straight ahead along Jalan Maarof but he could not do so. It is therefore unreasonable to expect the accused to have avoided Jalan Maarof completely because at that point of time he was not faced

with a similar danger and the deceased had also disappeared after each confrontaion. In the circumstances it is my firm finding that the apprehension of danger that the accused had to his body and life was reasonable. Thus he was entitled to exercise his right of private defence. But it must be observed that the deceased was armed only with a stick while the accused was armed with a gun which is a lethal weapon and that the injuries that he had sustained were of a superficial nature. However, the stick was not an ordinary twig. It was a thick branch and more than four feet in length. It is big enough to cause a person's skull or bones to crack if hit with it. The accused said in his cross-examination that it is a dangerous weapon while PW9 said that it could cause grievous hurt and possible death if hit on the head. I would thus describe it as a weapon of offence. The law that I have discussed earlier shows that it makes no difference that the deceased was armed with a stick and the accused with a gun; that serious injuries need not be inflicted before the right of private defence can begin; that it is not the injuries already inflicted but the injury that may be inflicted if the right is not exercised that must be considered; that there is no obligation on the accused to run away in the face of the danger that he was facing; that the accused may turn round and attack in the face of the danger; that a gun may be used in private defence and that the right extended even to the killing of the aggressor. I would therefore hold that the accused has proved on a balance of probabilities that he acted in the exercise of the right of private defence. He has therefore not committed any offence. Accordingly, I acquit and discharge him.